

University of Cambridge, Faculty of Law

KEEPING PROMISES IN FEDERAL SYSTEMS

**The legal status of intergovernmental agreements
with special reference to Belgium and Canada**

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* See Appendix A.

ABSTRACT

Intergovernmental agreements (IGAs) represent one of the most formal and commonly used instruments for managing intergovernmental relations within federal systems. Through an analysis of the Belgian and Canadian cases, this thesis was designed to test the following hypothesis: while IGAs apparently play similar functions in different federal regimes, the public law systems of different federations treat these negotiated instruments in a radically distinct fashion. While the first branch of the hypothesis is largely confirmed, the second branch requires more by way of nuance.

In both federations, IGAs are indeed used to articulate the exercise of exclusive but interconnected competences, to allocate responsibilities, share resources or channel funds from one order of government to another. They are used to create joint organs and outline processes for information-sharing, consultation and dispute resolution. But IGAs also perform less overt functions. They help redesign federal structures on the margins of constitutional norms. They are used to circumvent the formal distribution of powers and to introduce asymmetrical arrangements. They act as substitutes for constitutional reform or serve to by-pass constitutional amendment procedures. They can have a strong symbolic value as a matter of federal *realpolitik*.

The divergence in the legal character of IGAs was assessed in the face of this convergence of functions. The issue of legal status is tackled from three distinct angles. First, intergovernmental agreements are examined as contractual instruments between federal partners. From this perspective, the differences are more a matter of contrary presumptions than of radically different legal status. Indicia for locating IGAs on either side of the threshold of juridicity, taking these presumptions into consideration, as well as limitations germane to the respective public law systems, are identified.

Differences in legal status are more notable when IGAs are considered as normative instruments, that is as mechanisms for affecting the rights and obligations of third parties. In Canada, very few of the dozens of IGAs concluded each year are formally given the force of law through the proper technique of statutory incorporation. In Belgium, by contrast, cooperation agreements are mainly conceived as a novel – if ill defined – type of negotiated norm of public law. Legislative assent is frequently granted, which confers on Belgian IGAs legal force *erga omnes* in the legal orders of every party to them.

Finally, the main difference between the two systems may lie in the place which IGAs occupy in the hierarchy of norms. In Canada, federal partners may legislate in contradiction with an IGA. While the issue remains unresolved in Belgium, doctrinal arguments have been advanced to seek to protect cooperation agreements from unilateral repudiation. These differences concerning the hierarchy of norms reflect a distinct way of resolving the tension that exists between democratic freedom – including the power of assemblies to change their mind – and the stability of intergovernmental relations within a federal regime.

This dissertation is my own work and contains nothing which is the outcome of work done in collaboration with others, except as specified in the text and Acknowledgments.

This dissertation, including footnotes, does not exceed the permitted length.

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ACRONYMS (Institutions)

AB	Alberta
AC	Accord de coopération (Belgium)
AG	Attorney General
BC	British Columbia
BCSC	British Columbia Supreme Court
BCR	Brussels-Capital Region
C	Communities
CA	Court of Arbitration
CAP	Canada Assistance Plan
CAQ	Court of Appeal (Québec)
CACS	Coordinated Act relative to the Council of State
Cass.	Court of cassation
CAO	Court of Appeal of Ontario
CCF	Conseil de la Communauté française
Ch	Chambre (House of Representatives)
CJ	Chief Justice
COCOM	Common Community Commission (BCR)
COCON	Flemish Community Commission (<i>Commission communautaire néerlandaise</i>)
COCOF	French Community Commission (<i>Commission communautaire française</i>)
CRW	Conseil régional wallon
CS	Council of State
CSAS	Council of State, administrative section
CSLS	Council of State, legislative section
DMA	Double Majority Act
FCA	Federal Court of Appeal
FCTD	Federal Court Trial Division
FED	Federal authorities
Fr C	French Community
Fl C	Flemish Community
Fl R	Flemish Region
GC	German-speaking Community
HCA	High Court of Australia
IGA	Intergovernmental agreement
IIGR	Institute of Intergovernmental Relations
ITA	Internal Trade Agreement
MB*	Manitoba
NAALC	North American Agreement on Labour Cooperation
NAFTA	North American Free Trade Agreement
NB	New Brunswick
NF	Newfoundland
NFCA	Newfoundland Court of Appeal
NRTA	Natural Resource Transfer Agreements
NS	Nova Scotia
NSSC	Nova Scotia Supreme Court
NT	North West Territories
NV	Nunavut
OA	Ordinary Act
ON	Ontario

* Also used for Moniteur belge (*infra*, acronyms for publications). Distinction is obvious from context.

PCO	Privy Council Office
PE (or PEI)	Prince Edward Island
PC	Privy Council
QB	Queen's Bench
QC	Québec
R	Regions
s.92 <i>bis</i>	Section 92 <i>bis</i> of the 1980 Double Majority Act
SC	Superior Court
SCC	Secretariat to the Concertation Committee
SCC	Supreme Court of Canada
SK	Saskatchewan
SKCA	Saskatchewan Court of Appeal
WR	Walloon Region
YK	Yukon Territory

ACRONYMS (Publications)

AC*	Appeal Cases
Adel LR	Adelaide Law Review
Adm LR	Administrative Law Review
Adm publ	Administration publique
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
Alberta LR	Alberta Law Review
Anglo-American LR	Anglo-American Law Review
BCLR	British Columbia Law Reports
BYIL	British Yearbook of International Law
CA	Court of Arbitration [Reports]
Cam LJ	Cambridge Law Journal
Can BR	Canadian Bar Review
Canlii	Canadian Legal Information Institute (electronic data base)
Can Public Admin	Canadian Public Administration
CACS	Coordinated Act relative to the Council of State
C de D	Cahier de droit
Can Gaz	Canada Gazette
Can J Pol Sci	Canadian Journal of Political Science
CLR	Commonwealth Law Reports
CLUNET	Journal du droit international
CUP	Cambridge University Press
DLR	Dominion Law Reports
Doc Parl	Documents parlementaires
EJIL	European Journal of International Law
Ex CR	Exchequer Court Reports
FC	Federal Court [Reports]
FCT	Federal Court Trial (electronic version)
Fed LR	Federal Law Review
Florida LR	Florida Law Review
Hastings ICLR	Hastings International and Comparative Law Review
ICJ Rep	International Court of Justice Reports
IIGR	Institute of Intergovernmental Relations (publisher)
ICLQ	International and Comparative Law Quarterly

* AC also stands for "*Accord de coopération*" in footnotes. Distinction is obvious from context.

IRPP	Institute for Research in Public Policy
J of Comp Legisl	Journal of Comparative Legislation
JT	Journal des Tribunaux
KB	King's Bench
LGDJ	Librairie générale de droit et de jurisprudence
LQR	Law Quaterly Review
MB	Moniteur belge [Official Gazette]
MJ	Maastricht Journal of Comparative and European Law
McGill L J	McGill Law Journal
OR	Ontario Reports
Osgoode Hall LJ	Osgoode Hall Law Journal
OUP	Oxford University Press
Oxford JLS	Oxford Journal of Legal Studies
NJCL	National Journal of Constitutional Law
NR	National Reporter
Pas.	Pasicrisie belge
PUF	Presses universitaires de France
QB	Queen's Bench (Québec)
RBDC	Revue belge de droit constitutionnel
RBDI	Revue belge de droit international
RCADI	Recueil de cours de l'académie de droit international
RCJB	Revue critique de jurisprudence belge
RDIDC	Revue de droit international et de droit comparé
Rev droit de l'ULB	Revue de droit de l'Université Libre de Bruxelles
RDUS	Revue de droit de l'Université de Sherbrooke
R du B	Revue du Barreau (Québec)
RFS	Regional and Federal Studies
RGD	Revue générale de droit (Ottawa)
Rev Gén de droit	Revue générale de droit (Bruxelles)
RGDC	Revue générale de droit comparé
RGDIP	Revue générale de droit international public
RIDC	Revue internationale de droit comparé
RJQ	Recueil de jurisprudence du Québec
RQDI	Revue québécoise de droit international
RSA	Revised Statutes of Alberta
RSC	Revised Statutes of Canada
RSNB	Revised Statutes of New Brunswick
RSQ	Revised Statutes of Québec
SASR	South Australia State Reports
SBC	Statutes of British Columbia
SC	Statutes of Canada
SCR	Supreme Court Reports
SE	Session extraordinaire (Belgian Senate or House of Representatives)
SM	Statutes of Manitoba
SO	Session ordinaire (Belgian Senate or House of Representatives)
SNCB	Société nationale des chemins de fer
SPEI	Statutes of Prince-Edward-Island
SQ	Statutes of Québec
TBP	Tijdschrift bestuurwetenschappen publiekrecht
UNTR	United Nations Treaty Series
U of T Press	University of Toronto Press
WLR	Weekly Law Reports
WWR	Western Weekly Reports
YEL	Yearbook of European Law

GENERAL INTRODUCTION

1. Why study intergovernmental agreements?

Policy-making in multi-layered constitutional systems requires a substantial degree of information sharing, coordination, articulation, and even joint-action between various public actors. This is clearly the case of federal regimes. All modern federations have had to develop tools to coordinate the exercise of powers distributed amongst various decision-making entities.¹ Cooperation may not be an essential condition for the existence of a federal regime, but it may well be essential to an effective one.²

Harmonisation, co-ordination and dispute resolution may take different forms. “Cooperation” (the expression used in Belgium, Switzerland, Germany or Spain) and “intergovernmental relations” (an expression more frequently used in Canada, Australia and the United States) involve a wide range of institutional processes of various degrees of formality. They include phone calls between civil servants, interministerial meetings, the creation of joint bodies, interdelegation of regulatory power meant to circumvent the constitutional distribution of powers, negotiations within a political party apparatus active in different orders of government, as well as a variety of consultation processes. Such federal diplomacy can be vertical (between the central government and the federated entities) and horizontal (between those entities).³ It can be bilateral or multilateral. It ranges from the informal (meetings between decision-makers) to the conclusion of solemn agreements.

Intergovernmental agreements (IGAs) represent one of the most formal mechanisms of infra-state co-operation. IGAs are “ubiquitous”⁴ instruments of policy-making in federations, whether these systems are described as co-operative, collaborative,

¹ LECLERCQ, Claude, *L'État fédéral*, (Paris: Dalloz, 1997) 62.

² BERNIER, Ivan, *International Legal Aspects of Federalism* (London: Longman, 1973) 5 ff. For BERNIER, four conditions for the existence of a federal regime: 1) a division of powers between central and federated governments; 2) a degree of independence between them; 3) direct action on the people by both central and federated entities; 4) some means of protecting the distribution of powers. For some authors, cooperation is an inherent element of federalism: DELPÉRÉE, Francis, DEPRÉ, Sébastien, *Le système constitutionnel de la Belgique*, (Brussels: Larcier, 1998) 281-283; WILDE D'ESMAEL, Tanguy (de), “Les accords de coopération comme mécanisme de prévention et de solution des conflits : présentation de la nouveauté institutionnelle” in ALEN, André et al. (eds.) *Les conflits d'intérêts; quelle solution pour la Belgique de demain?* (Namur: La Charte, 1990) 90-122, 122.

³ SIMEON, Richard, *Federal-Provincial Diplomacy: the Making of Recent Policy in Canada* (Toronto: University of Toronto Press, 1972).

⁴ SWINTON, Katherine, “Law, Politics and the Enforcement of the Agreement on Internal Trade” in TREBILCOCK, M.J., and SCHWANEN, D. (eds.), *Getting There: The Agreement on Internal Trade* (Toronto: C.D. Howe Institute, 1995) 196-210, 196.

competitive, executive, or even “confrontational”.⁵ Their purpose varies from the mundane (an arrangement to co-finance the maintenance of a bridge), to the nearly-constitutional (when they are used to develop or counter formal constitutional norms).

The number of IGAs is very large in long-standing federations. Hundreds of interstate compacts have been concluded in the United States since 1783.⁶ There are nearly 1500 federal-provincial agreements currently in force in Canada, and the number of interprovincial agreements is also significant. IGAs are also very common in emerging federations. Hence, in Spain, over 500 *convenios* are concluded every year between Madrid and the autonomous communities.⁷ Of course, these numbers must be put in perspective. In Belgium, at least 200 “cooperation agreements” have been concluded since 1989, to which a significant number of non-binding protocols must be added. There has generally been an explosion of normative production (regulations, legislation) in the post-war period. Arguably, the increase in the number of agreements follows a similar trend.⁸ It could also be argued that in some federal countries, IGAs are substitutes for more traditional types of norms of public law. Whether recourse to agreements parallels the exponential recourse to other normative instruments or not, their quantitative importance is undeniable.

So is their qualitative significance. Over the last few years, there has been a renewed interest in intergovernmental agreements (IGAs) in older federations and concern about this institution in emerging ones. Hence, Swiss public authorities resort to inter-cantonal agreements as shields against centralisation, and have developed techniques to enhance democratic participation concerning their elaboration.⁹ Agreements have been blamed for the centralisation process in Australia and the United States.¹⁰ The transformation of Spain from a unitary State into a quasi-federation rests largely on an impressive practice of intergovernmental agreements. Even before the reinstatement of the Scottish Parliament,

⁵ DELPÉRÉE, Francis, “Le fédéralisme de confrontation” in DELWIT, Pascal, and al., (eds.), *Gouverner la Belgique : clivages et compromis dans une société complexe* (Paris: PUF, 1999) 53-69.

⁶ FLORESTANO, Patricia, “Past and Present Utilization of Interstate Compacts in the United States”, (1994) 24: 4 *Publius* 13-25.

⁷ This includes, however, a number of similarly-framed bilateral agreements between Madrid and the 17 entities: ALBERTÍ, ROVIRA, Enoch, “Relaciones de colaboracion con las comunidades autonomas”, in *Informe Comunidades Autonomas 2000* (Barcelona: Instituto de derecho publico, 2001) 58-70.

⁸ GERMANN, Raimund E., *Administration publique en Suisse, vol. 1: L'appareil étatique et le gouvernement* (Berne/Stuttgart/Vienne: Haupt, 1996) 10 ff.

⁹ ABDERHALDEN, Ursula, “La participation des parlements cantonaux à la conclusion de concordats intercantonaux”, (1999) 2 *Bulletin de législation*, Institut du fédéralisme de l'Université de Fribourg, pp. xxiii-xxix; BOGLI, Laurence, *Les concordats intercantonaux : Quels enjeux pour la démocratie*, (Lausanne: Institut de Hautes études en administration publique, 1998).

¹⁰ PAINTER, Martin, *Collaborative Federalism: Economic Reform in Australia in the 1990s* (Cambridge-NY-Melbourne: Cambridge U. Press, 1998) 101; Zimmermann, Joseph F., *Contemporary American Federalism: the growth of national power* (Leicester: Leicester U. Press, 1992) 139-146 and *Interstate Relations: the neglected dimension of federalism* (Westport, Conn: Praeger, 1996) 34-58.

architects of the devolution process in the United Kingdom elaborated a number of “concordats” to be signed by the Whitehall government and the new executives.¹¹

Similarly, since the “regionalisation” of the Italian State, central authorities have concluded a number of agreements with certain regions, on the margins of the traditional political process.¹² The failure of the various partners to respect cooperative agreements has been blamed for the Argentinian economic crisis of 2001-2002.¹³ The status of agreements between Moscow and the Republics or between the Republics themselves is particularly contentious.¹⁴ In Canada, “administrative agreements” are hailed as the alternative to unattainable constitutional reform.¹⁵ Until recently, Belgian “cooperative agreements” were considered essential tools for counter-balancing the effect of a very rapid constitutional decentralisation process. Now these routine vehicles of inter-federal relations are being vilified as weapons in the arsenal of those who promote a “confederal” vision of the country.¹⁶

In spite of their significance in federal regimes, IGAs have given rise to a very limited number of comparative studies.¹⁷ In fact, in some federations, they have hardly been studied at all. Public law textbooks in Switzerland, Spain, Belgium, the United States or Germany do discuss – often very briefly - the institution of intergovernmental agreements. By contrast, Canadian constitutional law treatises barely mention them.¹⁸ Their “justiciability” is

¹¹ RAWLINGS, Richard, “Concordats of the Constitution”, (2000) 16 L.Q.R. 257-286; POIRIER, Johanne, “The Functions of Intergovernmental Agreements: Post-Devolution Concordats from a Comparative Perspective” (2001) *Public Law* 134-157 [POIRIER, Concordats]

¹² Consiglio di Stato, Sezione Consultativa per gli Atti Normativi, 335/2005, 10.02.03.

¹³ “Acuerdo sobre la relación financiera”, CLARIN. 19.11.02: www.clarin.com.

¹⁴ COUNCIL OF EUROPE, Directorate General of Political Affairs, Working paper on Federalism in Russia Programme, Segment A: Legal Aspects of Federalism, Group VIII: “Division of competences and responsibilities by treaties and agreements”, 26.02.2002, updated 23.05.2002.

¹⁵ SIMMONS, Julie, “Securing the Threads of Cooperation in the Tapestry of Intergovernmental Relations: Does the Institutionalization of Federal-Provincial Territorial Ministerial Conferences Matter?” in INSTITUTE OF INTERGOVERNMENTAL RELATIONS, *The State of the Federation 2002-2003* (Kingston: IIGR, forthcoming) 7.

¹⁶ Commission de révision de la Constitution et de la réforme des institutions sur la loi spéciale de transfert de diverses compétences aux régions et aux communautés, Senate, Doc Parl, Senate, Report, SO 2000/2001, 2-709/7, 32 (VISEUR); DUMONT, Hugues, “Droit public, droit négocié et para-légalité” in GÉRARD, Philippe, OST, François, VAN DE KERCHOVE, Michel (eds.), *Droit négocié, droit imposé?*, (Brussels: Facultés Universitaires St-Louis, 1996) 457-489, 486.

¹⁷ The notable exception is GARCIA MORALES, Maria Jesus, *Convenios de colaboración en los sistemas federales europeos: estudios comparativo de Alemania, Suiza, Austria y Bélgica*, (Madrid: McGraw Hill, Madrid, 1998).

¹⁸ They are often mentioned in the context of a policy analysis: agreements in the field of social protection or fiscal federalism, for instance. But the legal analysis of these agreements is extremely limited in Canada. The exceptions are: BANKES, Nigel, “Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia”, (1991) 29 *Alberta L.R.* 792-838 and “Constitutionalized Intergovernmental Agreements and Third Parties: Canada and Australia”, (1992) 30 *Alberta L.R.* 524-554; ELLIOT, Robin, “Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values” (1991) 29 *Osgoode Hall L.J.* 215-251; FRIEDLANDER, Lara,

questioned and their fragility in the face of the doctrine of parliamentary sovereignty is asserted.¹⁹ This generally takes a few lines, sometimes a few paragraphs. Hence, an omnipresent and crucial tool of federal governance largely escapes legal analysis.

The apparent disinterest of legal scholars in such a widespread device of public policy is puzzling. It may be partly explained by the relative opacity of the instrument. Agreements are negotiated and concluded by executives: in fact, they are instruments *par excellence* of cooperative federalism. Until recently they were rarely made public and even more rarely discussed in the media.²⁰ In other words, the significance of IGAs may have been underestimated because they were not easily accessible and considered to be highly technical.

Even in countries where they have been the object of substantial academic analysis, a number of questions concerning their legal status and their relation to other types of norms remain unresolved or controversial. This is particularly true in Belgium, where constitutionalists tend to assert rather than demonstrate the legally binding nature of agreements. The legal character of the instrument is asserted as if any alternative were simply inconceivable.

Despite the desire of government parties to agreements to shield them as much as possible from parliamentary, media and judicial scrutiny, IGAs are increasingly coming before courts. Citizens seek to challenge the impact of governments' re-ordering their constitutional responsibilities on the margin of the Constitution. At present, judges *appear* bewildered by these instruments and the case law often seems result-oriented. In this context, the clarification of their legal status may be useful even if we admit that Courts are not necessarily the best forums to approach policy-making instruments.

2. The hypothesis

Based on a general exposure to the constitutional culture of both the Belgian and Canadian federal regimes, I initially had the sense that IGAs played very similar functions yet were treated in remarkably different ways by the public law regime of those federations.

"Constitutionalizing Intergovernmental Agreements" (1993) 4 *NJCL* 153-167; WILTSHIRE, Kenneth, "Working with intergovernmental agreements -The Canadian and Australian experience" (1980) 23 *Can Public Admin* 353-379; KENNET, Steven A., "Hard Law, Soft Law and Diplomacy: the Emerging Paradigm for Intergovernmental Cooperation in Environmental Assessment" (1993) 31 *Alberta LR* 644-661; BLACKMAN, Susan, *Intergovernmental Agreements in the Canadian Administrative Process, Technical Report* (Calgary/Ottawa: Canadian Institute of Resource Law, University of Calgary and Department of Justice of Canada, 1993), unpublished.

¹⁹ For instance: MAGNET, Joseph Eliot, "Constitutional Law of Canada: Cases, Notes and Materials", 7th ed., (Edmonton: Juriliber, 1998) 113-118.

²⁰ This is particularly true in Canada. In Belgium, some agreements have been published from the inception of the institution in 1988-89: *infra*, Chapter 2.

Basically, they seemed to be regarded as legal instruments in Belgium, and as merely political agreements in Canada. In the end, the first branch of the hypothesis, concerning the similarity of functions, is largely confirmed.

The fate of the second branch is more complex, and what I had first understood as a legally-binding/non-legally binding dichotomy requires a more subtle exposition. The first qualifier is that the dominant conception of the institution differs. Some see it as a contract, others as a means of – jointly – regulating particular matters. The latter conception is more clearly “normative” in the classic sense of the adoption of rules of general application.²¹ Hence, the problem is not that IGAs are more or less binding, it is they are not seen as the same kinds of instruments. When these two facets are taken into consideration, as I will argue they should be, the characterisation of IGAs in both federations does not differ as much as I had originally surmised. With some significant nuances which are explored in this thesis, some IGAs will pass muster as legal instruments, others will not, whether they are examined from a contractual perspective or from a “normative” one. The main difference may lie in the place which agreements occupy in the hierarchy of norms, that is their potential protection against unilateral repudiation by a party, notably through recourse to legislation.²²

In brief, then, this thesis will first outline the role and functions played by IGAs in the Belgian and Canadian federal systems, and then reflect on the legal status they enjoy in each. The conclusion will suggest some explanations for the differences that remain in this regard and will reflect on the role of law in intergovernmental relations.

3. The value of comparing Belgium and Canada

While I did study intergovernmental agreements in other federal and quasi-federal systems (Switzerland, Spain, the United Kingdom and to a lesser extent Australia and the United States),²³ in the end, an effective and sufficiently detailed analysis of more than two federal experiences seemed unachievable within the confines of this thesis. This is in part because an exploration of the status of intergovernmental agreements implies the deciphering of a number of issues, such as the court system, the law of standing, fundamental administrative and constitutional law concepts, political history, the particular relation which each country entertains between the domestic and international legal orders, and so on. Doing justice to more than two countries in this context seemed unrealistic, and carried the risk of a kind of superficial “legal tourism”. I thus decided to limit the present

²¹ CORNU, Gérard, *Vocabulaire juridique* (Paris: PUF, 1987) 560.

²² I use the term “potential” because the question is still unresolved in Belgium.

²³ POIRIER, Johanne, *Les accords de coopération belges au regard du droit comparé*, Rapport présenté à la Région de Bruxelles-Capitale, 30.11.2001 [POIRIER, Rapport 2001].

dissertation to an exploration of the experience of intergovernmental agreements in Canada and Belgium, with the intention of developing analytical approaches which could facilitate the study of the same phenomena in other federations.

The choice of Canada and Belgium as case studies was based on a number of criteria. On the one hand, these two countries share a number of similarities:

1. They are both full-fledged federal systems;
2. They share similar democratic and socio-economic characteristics, which imply a fairly high level of state intervention. In a federal system, interventionism implies a recourse to agreements to sort out the respective actions of various orders of government;
3. Because they are both multinational federations, a certain number of comparative studies have been undertaken, although they mainly tend to focus on aspects of accommodation of differences and minorities and not on technical issues such as the one I am interested in. Nevertheless, these comparisons provide an helpful background from which to launch my enquiries;
4. In theory, in neither country is there an official hierarchy between the various orders of government. In other words, the rule that “federal law trumps the law of federated entities” does not apply either to Canada or Belgium. It seemed reasonable to assume that consensual arrangements would be more developed in a system where one order of government cannot impose its will on another one through a direct legislative process;²⁴
5. As a correlative, only exceptionally are Belgian and Canadian federated entities “agents” of the centre.²⁵ In other words, by contrast with Switzerland and Germany, where cantons and Länder implement federal legislation, in Canada and Belgium each order of government has its own administration. It seemed reasonable to presume that this “independence” of each order of government could lead to a rich practice of agreements (as opposed to framework legislation to be completed by legislation or regulation of the federated entities, for instance);

²⁴ This, of course, is another over-simplification, since in Germany for instance, the Lander participate directly, through the *Bundesrat*, at the elaboration of federal legislation which then “trumps” their own normative instruments. The imposition from “above” is thus partly consensual: s.83 *Fundamental Law*; For Switzerland: s.49, *Constitution of 1999*.

²⁵ LAUVAUX, Philippe, *Les grandes démocraties contemporaines*, (Paris: PUF, 1998) 599-603; GERMANN (1996) 32 ff.; CURRIE, David, “Separation of Powers in the Federal Republic of Germany”, (1993) 41 *AJCL* 201-260.

6. Neither federation has a proper “federal” second chamber, allowing agreements between various orders to be transformed into more truly federal legislation (as opposed to legislation by central authorities). This could conceivably lead to a greater practice of IGAs;

7. Finally, Canada and Belgium are amongst the most decentralised western federations. One might expect an enhanced use of intergovernmental agreements in decentralised, as opposed to more centralised federations.

On the other hand, the choice of these two case studies was also guided by a number of distinctions with potential explanatory power with regards to the status of intergovernmental agreements:²⁶

1. The principal reason for choosing Belgium and Canada lies in the fact that – *a priori* – they are emblematic of the two distinct relations entertained between law and intergovernmental agreements. Preliminary readings revealed that in Belgium, IGAs are principally portrayed as legal instruments protected from unilateral denunciation by one of the parties. In Canada, by contrast, serious doubt is expressed concerning the nature of these agreements, and they are understood as particularly vulnerable to contrary unilateral action by one of the parties;

2. Belgium offers a contemporary example of a federal regime that proceeded from “dissociation”, while Canada results mostly from the union of various provinces in 1867.²⁷ The Belgian process of constitutional decentralisation was accompanied by the introduction of explicit mechanisms to ensure a certain degree of co-operation between the newly autonomous components of the State. Canada, as an older federation, developed cooperative mechanisms in a haphazard manner, through decades of intergovernmental diplomacy. Again, it seemed reasonable to assume that law could play a distinct role in regulating a centrifugal federal experience by opposition to a centripetal one;

3. Similarly, Canada is one of the oldest federations, while Belgium only officially became a federation in 1993. It seemed useful to reflect on the possibility that the

²⁶ Obviously, a number of differences between the two countries cannot be fully addressed or taken into account. This is the case, for instance, of their respective political party structure and culture, or their electoral system, although these could admittedly have an indirect impact on the practice of IGAs.

²⁷ These descriptions are conceptual short cuts: as the Canadian federation involved the union of three provinces, and the scission of one into two (the unified province of Canada which includes much of today's Ontario and Quebec). Nevertheless, the general trend in the two countries illustrates a classic distinction drawn in the literature on federalism.

later adoption of a federal structure could explain the greater recourse to legal instruments in the conduct of intergovernmental relations;

4. In Belgium, all legislative powers are deemed to be distributed on an exclusive basis between the various orders of government, while the Canadian federal system includes a fairly important number of concurrent powers, alongside lists of exclusive competences. I thought it could be revealing to examine whether this gives rise to a different practice regarding intergovernmental agreements;

5. The Belgian court system is still unified and under federal jurisdiction. The situation is more complex in Canada, where each province has its own judicial structure and where traditional rules of interjurisdictional immunity between the various orders of government were strictly applied until recently.²⁸ The “justiciability” of cooperative mechanisms faces a number of technical problems in a “dual” court system. In other words, it seemed useful to explore the possibility that the nature of judicial institutions could partly explain the reluctance to consider agreements to be of a legal nature;

6. The Belgian federal system developed within the civilian or “continental” legal tradition. In Canada, the rules of public law lie in the common law tradition. The potential impact of the legal culture in which the federal regimes evolved on the characterisation of IGAs deserved some consideration.²⁹ Moreover, developing their own original brand of federalism, and IGAs in particular, Belgian institutionalists were largely inspired by the theory and practice of Switzerland, and to a lesser extent Germany. By contrast, Canadian constitutionalists and courts have generally used other Commonwealth federations as sources of inspiration. Consequently, comparing Canada and Belgium provides an insight into the “continental divide” on either side of which these various federations as well.

²⁸ Once more, this is an oversimplification. A summary of each judicial system is provided in Chapter 1.

²⁹ This being said, the Canadian case is more complex, since private law is also governed by the common law in every province, except Québec, which is a civilian jurisdiction. Hence, the bi-juridical nature of Canada offers its own partial “continental divide”.

4. Methodology and Sources

- **The diversity of classic legal sources**

One of the first challenges of the attempted comparison lies with the differences in the nature and scope of available sources. In Canada, concern for IGAs is limited to a sort of political empirism, as opposed to any interest in the theory underlying them. Legislation pertaining to IGAs is rare and very general in nature. Consistent with the common law tradition, the few rules applicable to IGAs were developed over decades by courts faced with specific problems in specific historical contexts. Given this case-by-case approach and the relatively limited number of judicial decisions rendered on the subject since the inception of the federal system in 1867, the portrait that emerges is particularly hazy. Moreover, as was noted earlier, the legal literature on IGAs is also extremely limited. Consequently, the traditional theoretical component of the research on IGAs in Canada required a particular effort of systematisation.

By contrast, Belgian “cooperative agreements” were an explicit and deliberate addition to the arsenal of cooperative techniques elaborated in the wake of the massive constitutional decentralisation which the country has undergone over the last thirty years. They are the object of an impressive – if incomplete and sometimes ambiguous - legislative framework. When it was first introduced, the institution generated a certain degree of academic interest. Since then, the academic literature on agreements has tended to be repetitive and descriptive rather than analytical. Cooperation agreements have been the subject of a limited number of constitutional and administrative law cases, and of a substantial number of legal opinions by the Council of State. Some of these provide basic guidelines to the institutions, but overall, these sources are now essentially particular applications of rules elaborated in the early years. Consequently, the theory concerning cooperation agreements in Belgium is characterised by an apparently greater degree of coherence. This theory, however, does not always correspond to the actual practice. The classical, theoretical, approach thus had to be substantially completed by empirical research.

- **The agreements selected³⁰**

In both countries, I was authorised to consult registries and archives of the Federal Chancery in Belgium,³¹ the Privy Council Office in Ottawa³² and the Secretariat for Canadian

³⁰ See lists, Appendix B and C.

³¹ The Chancery acts as the Secretariat for the multilateral Concertation Committee (*infra*, Chapter 2) and is in charge of monitoring and archiving agreements (*Circular on Interministerial Conferences* of 15.03.2000, unpublished). In theory, its registry should contain every cooperation agreement. In practice, it centralises agreements to which federal authorities are party. Agreements between

Intergovernmental Affairs (SAIC) in Québec City.³³ This gave me access to unpublished material as well as to agreements which are technically accessible, but for which specific access to information procedure would normally be required.³⁴

Initially, I thought it would be useful to select agreements pertaining to one specific policy area in order to assess the practice of IGAs and confront it with the theory. The research turned out to be more dialectical than I had anticipated. Reading agreements modified my theoretical perspective and led to questions to which only the consideration of a wider spectrum of agreements could provide answers. I therefore broadened the research and chose agreements based on a variety of criteria. In the case of Belgium, the “raw material” (somewhere around 200 agreements and protocols) is manageable and reading them gave me an opportunity to assess the scope of the practice.

Such a systematic assessment is impossible in Canada given the number of IGAs and the lack of complete archives. I therefore selected agreements from the Québec and the PCO Registries based on a number of criteria, notably those known to include explicit dispute resolution clauses, or agreements which, from a summary of their content, seemed more likely to fall either within the “binding” or the “non-binding” category. In other words, I read upwards of 500 Canadian agreements, from lists totalling around 1500, and selected them from a combination of “semi-directed” criteria and “hunches”. The approach followed in selecting the agreements was thus both inductive and deductive.

IGAs selected for the present comparative analysis are formal, written agreements concluded between federal authorities and those of federated units. I have thus excluded agreements concluded by federal or federated authorities with other public entities, such as municipalities, or with private parties. Exceptionally, agreements to which government agencies, that is semi-autonomous bodies under the authority of a Minister, were also

federated entities are not systematically transmitted to the Secretariat. The registry is thus incomplete. The Registry is basically a computerised list of agreements, with certain data (date of signature, governmental approval, publication etc.). Paper copies are archived. Agreements published in the *Moniteur belge* (MB: Official Gazette) are now available on line. Not all agreements are published, however.

³² The PCO Registry is a full-text catalogue, which allows sophisticated computer searches (but containing no information relating to legal character, legislative authority and so on). It was started in 1998 and contains about 1300 agreements (05.2003). The collection of agreements depended on the collaboration of various Departments, and it is admitted that the Registry is far from complete. This is particularly true of older agreements, not longer thought to be in force.

³³ Though it only formally set up in 1991, the Québec Registry is far more complete in terms of agreements to which the province is party because the SAIC had centralised IGAs from earlier times. At the end of 2001, this registry contained over 1600 agreements, 534 of which were considered to be in force. Catalogued a produced, with summaries of all agreements. They are not in full-text however: paper copies are archived.

³⁴ Given that in Canada, the only province in which I conducted systematic research in Québec, there is a clear Québec bias in the material consulted.

included.³⁵ Likewise, I did not consider agreements concluded between First Nations and various Canadian authorities. This is because s.35 *Constitution Act 1982* has entrenched Treaty rights, including existing or future agreements related to territorial claims. In addition, the theoretical and historical issues related to agreements between Canadian authorities and the First Nations would have required a detailed and specific analysis of a vast body of cases and doctrine on aboriginal law, which is beyond the scope of the present research.

This is not to deny, however, that the status of agreements with other public authorities, private parties, or aboriginal groups, is unrelated to the present topic. The following chapters include occasional examinations of judicial decisions involving “non-federal” actors, when the principles founding the decisions provide a certain illumination on the status of agreements between governments within a federation. Furthermore, it may be that some of the findings of the present thesis could make a modest contribution to the reflection concerning the complex interaction between the legal and judicial system with regards to such agreements.

- **Interviews conducted**

In addition to the study of actual agreements, the theoretical analysis was enriched by some sixty semi-structured interviews.³⁶ In Belgium, I had the privilege of discussing the institution with persons who actually “invented” it and were responsible for its introduction in the legal order. In both Canada and Belgium, I also interviewed civil servants and political staff who negotiate agreements, and some judges who had ruled on their status or had rendered administrative decisions related to them. Interviews were also conducted with archivists and administrative staff who are charged with the collection, classification, publication and follow-up of agreements. Finally, given the limited scope of academic writing on IGAs in both federations, I also conducted interviews with a number of constitutionalists.

The interviews were aimed at assessing the scope of the practice, locating agreements, as well as understanding the legal and political culture that leads to their general – *a priori* - conception as legal instruments in Belgium or as essentially political devices in Canada. Discussions also allowed me to assess the actual practice of agreements, which is often in striking contradiction with the positive law literature on the subject. Consequently, these interviews allowed me to evaluate the theory of agreements from a practical perspective. In addition, interviews conducted in other federations, in the

³⁵ This is the case, for instance, of IGAs relating to the marketing of agricultural products which federal and provincial authorities have largely delegated to various Boards. Actors themselves consider such agreements as “intergovernmental”: *Agreement on All Milk Pooling*, 01.08.1997 (PE-MB-NB-NE-ON-QC) (CA01708), Appendix B.

³⁶ Appendix A, a few names were withheld at the request of interlocutor.

context of another study (POIRIER, Report 2001), were extremely helpful to identify the issues at play in Belgium and in Canada.³⁷

5. Theoretical framework

This thesis is essentially an exercise in comparative public law. It aims at describing and contrasting how IGAs are understood and treated by the positive law of two distinct federal regimes. The functional approach chosen is obviously directed at the principal object of the thesis, that is, intergovernmental agreements.³⁸ It is also used to identify functional equivalents of a number of relevant legal doctrines and institutions in both systems (such a legitimate expectations, constitutional conventions, good faith, federal loyalty, and so on) and the absence of equivalence (parliamentary sovereignty). The objective is also to compare the underlying logic of various legal rules, doctrines or principles invoked in the analysis of the status of agreements. Not only was the functional approach useful to identify equivalent and divergent rules, it was also helpful in understanding that analysts of IGAs in both federations did not share the same underlying conception of the IGAs. A constant search for the equivalent discourse of actors, judges and authors in the two systems lead to this basic but fundamental distinction, around which Part II of the thesis is constructed.

I had originally – and ambitiously – planned to explore the status of IGAs from a number of theoretical perspectives, notably that of the sociology of law, legal pluralism, as well as from the “network” paradigm of legal norms, rather than the traditional pyramidal one. I still believe these various angles would deepen the understanding of the role played by IGAs in federal regimes. The scope of this thesis does not allow for such a multi-faceted enquiry. In fact, the very identification of the positive law applicable to IGAs in the two federations turned out to be far more complex than I had anticipated. The present thesis can therefore be understood as part of a larger research agenda.

Some of the findings relating to this thesis have been published elsewhere, and justifies in part the decision to leave out of the present text a number of aspects concerning the legal status of IGAs.³⁹ Hence, unless they have a direct bearing on the characterisation of IGAs as legal instruments, I will not address technical problems presented by the judicial systems in dealing with them.⁴⁰ I have also largely left out the analysis of the “continental

³⁷ The most significant ones are also included in Appendix A.

³⁸ The functional approach seeks to compare rules/institutions/principles, which play similar functions in different legal systems: ZWEIGERT, Konrad, KÖTZ, Hein, *Introduction to Comparative Law*, 3rd ed. (Oxford: Clarendon Press, 1998) 34 ff.

³⁹ See bibliography.

⁴⁰ This means issues of standing, inter-jurisdictional immunity and so on. On this, see : POIRIER, Johanne, “Intergovernmental Agreements in Canada: at the cross-roads between law and politics” in

divide” on the status of IGAs, that is, the potential impact of the civilian vs. common law conception of contracts or good faith, for instance, on the status of IGAs.⁴¹ These issues have however informed my research.

Despite the focus on positive law, the following analysis nevertheless borrows from the sociology of law and the theory of legal cultures in three distinct ways. First, IGAs are by-and-large respected by all actors, who rarely appeal to the legal system. In fact, compliance with IGAs is high even when IGAs actually contradict rules of positive law.⁴² Secondly, their para-constitutional functions help shape constitutional practice, on the margins of the respective federal constitutions. The concept of “para-constitutionality” is adapted from the notion of “*para-legalité*”, that is rules that develop on the margin of official ones, often in contradiction with them, and yet that gradually become incorporated into positive law.⁴³ Thirdly, in attempting to explain the different treatment – under positive law – which each federation reserves to IGAs, I will borrow from the theory of legal cultures.⁴⁴ Here, the hypothesis is that the predominant conception of IGAs as legal or political instruments flows from a number of factors which pre-condition the way relevant observers, legal scholars and judges, interpret them.⁴⁵

6. Structure of the thesis

The thesis is divided into two major parts, corresponding to the two branches of the hypothesis. After presenting the major characteristics of each federal system, the existing legal framework regarding IGAs in both Belgium and Canada and describing the practice of IGAs, Part I surveys the functions they actually play in each federal regime.

Part II explores the status of IGAs within the public law systems of both federations, from a variety of angles. IGAs are successively considered as contractual instruments between the executives who conclude them and as normative instruments *erga omnes*, that

INSTITUTE OF INTERGOVERNMENTAL RELATIONS, *The State of the Federation 2001-2002* (Kingston: IIGR, forthcoming) [POIRIER, *Cross-roads*]

⁴¹ For partial findings on this question, see: POIRIER, Johanne, “Les ententes intergouvernementales et la gouvernance fédérale: aux confins du droit et du non-droit” in GAUDREAU-DESBIENS, Jean-François and GÉLINAS, Fabien (dir.), *L’avenir du fédéralisme: Méthodologie, gouvernance et identité* (Montréal/Brussels: Yvon Blais/Bruylant, forthcoming 2004) [POIRIER, *Confins*].

⁴² ROCHER, Guy, “L’effectivité du droit” in LAJOIE, Andrée, ed., *Théories et émergence du droit : pluralisme, surdétermination et effectivité*, (Paris/Brussels: Thémis/Bruylant, 1998) 135-149; MOCKLE, Daniel, “Gouverner sans le droit : mutation des normes et nouveaux modes de régulation”, (2002) 43 *C de D* 141-210.

⁴³ DUMONT, *Droit négocié*; DUMONT, Hugues, *Le pluralisme idéologique et l’autonomie culturelle en droit public belge*, vol. 1 (Brussels: Bruylant, 1996) 43-51.

⁴⁴ NELKEN, David, “Comparing Legal Cultures: An Introduction” in NELKEN, David (ed.), *Comparing Legal Cultures*, (Dartmouth: Aldershot, 1997) 1-9.

⁴⁵ “[T]he law lives in a profound-way within a culture-specific – and therefore contingent – discourse”: LEGRAND, Pierre, “The impossibility of legal transplants”, (1997) 4 *MJ* 111-124, 124.

is, as instruments capable of creating rights and obligations of a general character. An analysis of the place they occupy in the hierarchy of legal norms in each of the federal regimes follows.

The final chapter summarises the major similarities and differences in the legal status enjoyed by IGAs in the two federations. It then offers a reflection on the relevance of the classic positive law paradigms through which the analysis was conducted: the threshold of jurisdiction and the hierarchy of norms.

Through the examination of the phenomenon of IGAs in two federations, my objective is:

- To provide a critical assessment of the functions which IGAs actually play in federal regimes;
- To identify indicia of legal status for determining whether a particular agreement is binding (under positive law) on the parties who sign them, as well as their effect on third parties;
- To reflect on the competing values which underlie the tension concerning the status of IGAs with regards to other types of norms, notably legislation;
- To suggest explanations for the apparently divergent status reserved to IGAs in different federal systems.

More generally, the purpose of the thesis is to reflect on the phenomenon of comparative federalism through the prism of a technical instrument of intergovernmental relations. While the object is a “microcomparison” (the examination of one institution), some of the findings can hopefully contribute to the “macro” analysis of the diversity of federal experience.⁴⁶

⁴⁶ On the difference between “micro” and “macro” comparison: ZWEIGERT, Konrad, KÖTZ, Hein, *Introduction to Comparative Law*, 3rd ed. (Oxford: Clarendon Press, 1998) 4-5.

7. Preliminary remarks on terminology

Comparing an institution in two very different legal systems requires a degree of decoding, and harmonisation of technical terms. Here are the major lexical compromises used throughout this text.

- **Intergovernmental agreements (IGAs):** The agreements analysed in this thesis are formal, written agreements, concluded by the executives of federal authorities, as well as those of federated units. While all federal regimes apparently rely on such agreements, they go under a vast number of names.⁴⁷ I have chosen to use the term “intergovernmental agreements” as a generic term which covers Swiss “intercantonal conventions”, British “concordats”, American “interstate compacts” or Spanish “*convenios*” and Belgian “cooperation agreements”, although in this last case, the specific term “cooperation agreement” will generally be used.
- **Orders of government:** I prefer the expression “order of government” to “level of government” because it does not imply a formal hierarchy between constitutive units and the central/federal government. While this absence of hierarchy does not characterise every federal regime, it describes the official constitutional conceptions of the Canadian and Belgian federal structures.
- **State, government, Crown, administration, public authorities:** In Canada, the terms “State”, “government” or “Crown” are used interchangeably.⁴⁸ They refer to the executive branch, whether federal or of the constitutive units. In Belgium, the term “State” tends to refer to the federal order (both the legislative and executive branches), while “administration” is commonly used to refer to the executive branch of any order. In this thesis, I use “government”, “executive” or “public authorities” to refer to the executive or administrative branch of both federal and federated orders.

⁴⁷ Only in Canada, I have identified over 40 different designations in French and in English, ranging from “lettre d’entente” to “contrat de concession” and from “cooperative action framework” to “loan agreement”.

⁴⁸ HOGG, Peter W., *Constitutional Law of Canada* (Toronto: Carswell, 1998) 268; LORDON, Paul, OLSON, Heather, RHÉAUME, Jean, “Le statut juridique et constitutionnel de la Couronne au Canada” in MINISTÈRE DE LA JUSTICE DU CANADA, *La Couronne en droit canadien* (Cowansville: Yvon Blais, 1992) 1-31, 6. In fact, the French title of the federal *Crown Liability Act* is *Loi sur la responsabilité de l’État* : RSC 1985, c. C-50.

- **Courts, judiciary, judicial system, judicial review:** I use the terms “courts” and “judiciary” to refer to non-political dispute resolution fora.⁴⁹ Hence, the Belgian Council of State, which is responsible for the judicial review of administrative action, is considered, somewhat heretically, as a judicial organ. I do not distinguish between courts and tribunals, except in the case of arbitration tribunals. In the Belgian context, “ordinary courts” refers to judicial institutions apart from the Court of Arbitration, the Council of State and cooperation tribunals.
- **Legislation, legislative instruments, statutes:** Texts voted by Belgian federated entities are called “decrees” or “ordinances”, although they have the same legal force as federal “*loi*”. In Canada, the term legislation includes, in some cases, subsidiary legislation, that is, regulations. Because the distinction between norms adopted by the legislative and the executive branches is relevant to IGAs, I will use “legislation”, “legislative instrument”, “Acts” or “statutes” to refer to the former and “regulation” or “regulatory instruments” to refer to the latter.
- **Juridicity:** One the principal objects of this thesis is to identify if and how IGAs can move from the moral/political sphere to the legal one, that is when they cross the “threshold of juridicity”. I do not use the term “legality” in this context because it ambiguously also refer to validity of an instrument. Something is “juridical” if it is capable of having legal effect, whether or not it has them.⁵⁰ An IGA that has crossed that threshold will be deemed to have a “legal character”.⁵¹
- **Justiciability, enforceability:** An issue will generally be deemed “justiciable” if it is “capable of” and “suitable” or “appropriate” for judicial determination.⁵² While the question of the legal enforceability of agreements partakes of the enquiry of their justiciability, those two notions are not coterminous. A court may make a judicial declaration regarding an IGA,⁵³ or rule on a number of issues relating to an IGA (its constitutionality, its validity, the validity of administrative decisions taken pursuant to it) without actually forcing a party to respect the undertakings contained therein.

⁴⁹ In Belgian law, tribunals are low-level courts: D’HOOGHE, D. and PEETERS, P., “The Judiciary” in CRAENEN, G. (eds.) *The Institutions of Federal Belgium: an Introduction to Belgian Public Law* (Leuven: Acco, 1996) 109-130, 111.

⁵⁰ “*Caractère de ce qui relève du droit*”: CORNU (1987) 477. MERRYMAN talks of a “juridical order”: MERRYMAN, John Henry, “Comparative Law Scholarship”, (1998) 21 *Hastings ICLR* 771-784, 775.

⁵¹ Arguably, it may be more logical to use the expression “juridical character”, although “legal character” is the common usage, from which I see no need to depart.

⁵² SOSSIN, Lorne, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, (Toronto: Carswell, 1999) 2 ff.

⁵³ PARÉ, Marie, GRENIER, Danièle, *La requête en jugement déclaratoire*, 2nd ed. (Cowansville: Yvon Blais, 1999).

PART I

INTERGOVERNMENTAL AGREEMENTS IN BELGIUM AND CANADA: LEGAL FRAMEWORK, PRACTICE AND FUNCTIONS

INTRODUCTION

This first part of the thesis introduces the institution of intergovernmental agreements (IGAs) in the two federal systems and aims at testing the first branch of my hypothesis: that such agreements a large number of similar functions in federal regimes. It is divided into three chapters. Chapter 1 presents the constitutional and political backdrop to the practice of IGAs in each federation. Chapter 2 surveys that practice of IGAs (what they are, who concludes them, how, in what field). It notably outlines the legislative framework within which this practice develops. Chapter 3 then explores what IGAs are actually *for*. Despite differences in constitutional, legislative and political background, IGAs they play remarkably *convergent* functions in the two federal regimes.

CHAPTER 1: THE CONSTITUTIONAL AND POLITICAL FOUNDATIONS OF IGAS

Introduction

Federal systems are “package deals”: isolating one aspect of government policy or administration from another or one institution from another may lead to distorting simplifications.¹ It is therefore important to set the practice and theory of intergovernmental agreements in their political, legal, historical and cultural context. While the scope of this thesis does not allow for a detailed exposition of the complexities of the Belgian and Canadian federal regimes, the present chapter maps out the principal characteristics which have some bearing on the need for IGAs, the way in which they are used, and the status they enjoy. It then briefly describes the respective court systems as well as the principal mechanisms of inter-federal cooperation.

1.1 The constitutional and political foundations of cooperative agreements in Belgium²

1.1.1 Major characteristics of the Belgian federation

After centuries of Spanish, Austrian, French and Dutch domination, Belgium gained its independence in 1830. Despite the fact that a large portion of the population spoke Dutch dialects, the 1831 Constitution created a unitary French-speaking State apparatus. The history of the last hundred and seventy years has been a complex one of peaceful co-existence, political tension, and cultural affirmation which has gradually been translated into political claims for increased autonomy by the different language groups.³

Over the last thirty years, Belgium has thus gradually been transformed from a unitary state into a federation. The first traces of the territorial divisions of the country, based on linguistic lines, go back to 1963. The federal system was installed gradually, through five stages of institutional reforms, starting in 1970. The most recent (and likely not the last) one dates from 2001. It was only at the fourth stage, in 1993, that the Belgian Constitution

¹ JACKSON, Vicki C., “Comparative Constitutional Federalism: its Strengths and Limits”, in GAUDREAU-DESBIENS, Jean-François and GÉLINAS, Fabien (dir.), *L’avenir du fédéralisme: Méthodologie, gouvernance et identité*, (Montréal/Brussels: Yvon Blais/Bruylant, forthcoming 2004).

² Significant portions of the analysis of Cooperative federalism in general, and of cooperative agreements in particular, have been published in POIRIER, Johanne, “Formal Mechanisms of Intergovernmental Relations in Belgium”, (2002) 12: 3 *RFS* 24-54 [POIRIER, Formal].

³ The linguistic divide is super-imposed on two other cleavages which were of even greater importance until the second part of the 20th century: class and religious/philosophical (ie catholic vs. secular): MABILLE, Xavier, *Histoire politique de la Belgique: Facteurs et acteurs de changement*, 2nd ed. (Brussels: CRISP, 1997).

explicitly described the country as a federation.⁴ The gradual and incremental decentralisation of a once unitary state required compromises that have resulted in particularly complex institutional arrangements.⁵

In the context of a discussion of intergovernmental relations, five major characteristics of Belgian federalism should be underlined. First, it is *centrifugal* and the process towards more devolution is probably not complete. This implies that previously unitary policy areas need to be disentangled without, as far as possible, disrupting service delivery. Secondly, it is *bipolar* since the successive reforms were responses to conflicts between the two major language groups: the Dutch who form nearly 59% of the population, and the French-speakers, who represent around 39%. Several of the cooperative measures I examined respond to this bipolarity. Thirdly, and paradoxically, it is also *multipolar*, since the bipolar nature of the conflicts did not generate a clear territorial division of the country into two entities, mostly because of Brussels. This now overwhelmingly francophone city is enclaved in Flanders, and could therefore not be attributed either to the Flemish or the Francophone entity. Moreover, Belgium has a small German-speaking community (80,000) which also inherited autonomous political institutions. In short, while the logic of Belgian federalism is bipolar, several solutions designed to respond to different tensions are multipolar.

Fourthly, and this is surely the most original aspect of the Belgian federal system, there are *two types of overlapping federated entities*, with distinct constitutional powers: the Regions and the Communities. For reasons which cannot be detailed here, these were responses to distinct demands by the two major cultural/linguistic groups in the country. The three Regions (Flanders, Wallonia and the Region of Brussels-Capital (RBC)) are quite typical territorial constitutive units, much like provinces, cantons or Länder. They have competences over aspects linked to territory: land use, agriculture, environment, transportation, economic policy, administrative control over municipalities. Communities are somewhat more complex: they are an incarnation of “personal federalism”, but with a significant nuance. While their competences related to persons (education, social assistance), they do not reach to all persons who speak French or Flemish anywhere in Belgium. This “personal federalism” has been partially territorialised. To give a concrete example: the French Community cannot open a cultural centre for Francophones on the

⁴ *Constitution*, s.1.

⁵ See: DELPÉRÉE, Francis, *Le droit constitutionnel de la Belgique* (Brussels/Paris : Bruylant/LGDJ, 2000); CRAENEN, G., ed., *The Institutions of Federal Belgium : an Introduction to Belgian Public Law*, (Leuven: Acco, 1996); FITZMAURICE, John, *The Politics of Belgium : a Unique Federalism* (London: Hurst and co., 1996); LAGASSE, Charles-Etienne, *Les nouvelles institutions politiques de la Belgique et de l'Europe*, 2nd ed. (Namur: Artel, 1999); UYTENDAELE, Marc, *Précis de droit constitutionnel belge: Regards sur un système institutionnel paradoxal* (Brussels: Bruylant, 2001).

territory of Flanders: its “personal competencies ” only apply on the territory of Wallonia and Brussels.⁶

Fifthly, the Belgian federation is *asymmetrical*. While powers are technically devolved in a similar fashion to similar entities, those entities may - and do - organise their institutions differently. The most important distinction is the decision by the Flemish authorities to merge their Community and Regional institutions, while such a fusion has not taken place on the French side of the country. This has led to different patterns of cooperation in the North and the South of the country. Finally, as the foregoing discussion suggested, the Belgian federal architecture is extremely intricate,⁷ veiled in ambiguity and build on a number of “agreements to disagree”. The different conceptions of the Belgian system within the Belgian political and constitutional circles are such that there is no agreement even on the actual number of federated entities!⁸

1.1.2 The formal distribution of competences

Given the overlapping Regions and Communities, the formal distribution of competences is extremely complex. It is provided for in the Constitution, some “ordinary” legislation⁹ and some “special” or “Double Majority Acts” (DMAs), that is legislation voted by a two-thirds overall majority, and by a simple majority in each of the French and Dutch-speaking groups in the federal Parliament.¹⁰ While those are federal statutes, they are of a constitutional nature: other legislative instruments (both federal and of the federated entities) must conform to them.¹¹

In theory at least, all legislative powers are exclusive. The drafters of the successive constitutional arrangements opted for exclusive as opposed to concurrent powers in the hope of avoiding conflicts of jurisdiction. In fact, constitutional litigation to determine the boundaries of these exclusive competences is still frequent. The detailed distribution of powers implies that a particular policy area may be covered by several distinct constitutional powers, thus making co-ordination essential. As was mentioned above, Regions have competences over transportation, agriculture, environment, tourism and segments of

⁶ CA54/1996; CA30/2000.

⁷ This is particularly true of Brussels, which is both a regional entity, but has three “commissions” constituted of sub-groups of the regional parliament, in charge of “community affairs” (the COCOF, COCOM, COCON). None of these three commissions has identical authority of functions.

⁸ The contest is always about the COCOF (the French Community Commission of Brussels) which Francophones consider a full-fledged federated entities, a view generally resisted by Flemish officials.

⁹ Hereinafter: “Ordinary Acts” (OA). The most important ones are the 1980 and 1983 and the 1989 OA (details in bibliography).

¹⁰ Hereinafter “Double Majority Act” (DMA). The most important ones are the 1980 and the three 1989 DMA (see bibliography).

¹¹ UYTENDAELE refers to them as laws of the “global state” (2001) 118-120.

economic affairs. Communities are competent in matters of education and culture. Meanwhile, federal authorities have retained competences over defense, justice, the police, social security, civil, commercial and labour law and a number of detailed exceptions to otherwise transferred competences, as well as residual powers.¹²

The following examples, amongst many, should give an indication of the importance of cooperation, lest policy-making and public administration be completely paralysed:

- Preventive health is a community matter, while health care insurance is federal;
- Unemployment insurance is federal, but the placement of unemployed people is regional, while professional training is a community matter;
- Education is a community matter, but the recognition of professional qualifications is federal, while the organisation of school transport is regional.
- Transportation policy is regional, with the exception of the railway system, which has remained federal. Personal access programmes for people with reduced mobility, however, are essentially a community matter.

This triad of orders of government (federal, regional, community) implies that some policy areas will require cooperation between two orders of powers, others between all three. The variety of permutations in terms of cooperation is thus greater in Belgium than in other federal systems based on a single type of territorial entities.

Foreign affairs represent another area in which cooperation is essential. In 1993, federated entities were granted wide powers over foreign relations. This includes the power to conclude treaties and to be full members of international organisations involved in matters falling within their legislative powers.¹³ There is thus a correspondence between the domestic distribution of powers and powers to conduct foreign relations. However, the preservation of a certain degree of coherence in the overall Belgian foreign relations requires a fair amount of cooperation between the different orders of government. Moreover, international activities or treaties often involve different aspects that - in Belgium - fall within the legislative competence of various orders of government. A number of cooperative measures have been instituted to articulate joint positions or interconnected action, including formal cooperation agreements.¹⁴

¹² S.35 of the *Constitution* actually anticipates the transfer of residual powers to federated entities, but does not specify which ones. This section requires a DMA which has never been adopted.

¹³ S.167, *Constitution*.

¹⁴ Notably, formal cooperation agreements: *infra*, Chapter 3.

1.1.3 An overview of the Belgian court system

Such a complex system is bound to generate tensions, some of which can be addressed by judicial organs. The following sketch is required to sort out the case law regarding IGAs, as well as contradictions between assertions of legal character and occasional lack of legal forum for dispute resolution.

In Belgium, conflicts concerning the constitutional distribution of powers are settled by three different federal judicial institutions. First, the legislation division of the Council of State (CSLD) provides a legal opinion on the constitutionality and legality of all proposed legislative measures, whether they emanate from the federal Parliament or the federated legislatures.¹⁵ As its advice is not binding, it is regularly ignored.

Secondly, the Court of Arbitration controls the conformity – *a posteriori* - of legislative measures with the distribution of powers and some enumerated fundamental rights.¹⁶ It cannot rule on the constitutionality of regulations.¹⁷ That is the role of the *administrative* division of the federal Council of State (CSAD). The latter is also responsible for what a common law system would consider judicial review of administrative action.¹⁸

All “ordinary” courts and tribunals¹⁹ must refuse to apply orders and regulations (but not legislation) that are contrary to law.²⁰ This enables all of them to review – indirectly -- the constitutionality of regulatory instruments. Review of the constitutionality of legislative provisions can – and sometimes must - be referred to the Court of Arbitration as a question “*préjudicielle*”, if the question arises in the course of judicial proceedings.²¹

“Ordinary courts” have jurisdiction over civil, criminal (and some so-called “political”) rights. Final appeals in these matters lie with the *Cour de Cassation*. In other words, there are three final courts: the Court of Arbitration, for constitutional matters, the Council of State,

¹⁵ Ss 160-161, *Constitution*; s. 26, *Coordinated Act concerning the Council of State* (CACS). A private member’s bill may also be referred for a legal opinion if one third of the assembly requests it: s.2(2) CACS.

¹⁶ Ss. 10, 11, 24, *Constitution*. (equality, protection against discrimination and education rights); 1989 DMA on the Court of Arbitration (1989 DMA on CA) s.1. Note that the Court has extended its own jurisdiction by protecting other rights (such as the right of association) through the prism of the right to equality: see for instance: CA18/90.

¹⁷ CA7/90.

¹⁸ “Substantive formalities” (that is, particularly significant ones) or formalities provided for “*sous peine de nullité*”: CACS, s.14.

¹⁹ Under Belgian law, tribunals are lower-level judicial courts: D’HOOGHE, D. and PEETERS, Patrick, “The Judiciary” in CRAENEN, G. (ed.) *The Institutions of Federal Belgium: an Introduction to Belgian Public Law* (Leuven: Acco, 1996) 109-130, 111. Courts apart from the Court of Arbitration and the Council of State are regularly referred to as “*tribunaux judiciaires*”. In will refer to them as “ordinary courts”.

²⁰ S.159, *Constitution*.

for administrative matters and the Cour de Cassation for civil, commercial and criminal matters. In view of what follows, it bears pointing out that “ordinary courts”, not the Council of State is competent over government contracts.²²

1.1.4 Cooperative federalism in Belgium

Belgium has been profoundly restructured over the last thirty years. As in the case of Spain or the United Kingdom, constitutional decentralisation occurred in the context of a highly interventionist state apparatus. This has led to a particular concern with methods of cooperation to ensure continuity in service delivery and open channels of communication between administrations that used to be unified. While older federations have developed cooperative mechanisms in a haphazard manner, through decades of intra-state diplomacy, Belgium exemplifies the deliberate attempt to elaborate cooperative processes concurrently with the decentralisation process.

Moreover, the “federalisation” of Belgium results from considerable tensions between the two major linguistic communities. Consequently, many feared that cooperation would not occur spontaneously in this new federalism of “dissociation”. This, it was argued, required the provision of explicit cooperative mechanisms.²³ In Belgium, co-operation is thus perceived as the necessary counterpart to the increased autonomy of the federated entities²⁴. It is seen as a pragmatic tool for the political and legal coordination of the exercise of a very complex distribution of powers. Cooperation also plays a role in the promotion of dialogue in a country faced with serious centrifugal tendencies.

The particularly antagonistic nature of Belgian politics, and a strong preference for legal instruments as opposed to mere political agreements,²⁵ explains why many forms of intergovernmental relations have a statutory foundation and are - at least in theory - justiciable in Belgium, when they do not necessarily enjoy the same degree of formality in

²¹ Ss.26-30, 1989 DMA on the CA.

²² By contrast with the situation in France: It must be noted, however, that some contracts concluded by public authorities in France are not governed by the special regime reserved to “administrative contracts” (sale, lease, insurance). There are therefore, in France, two categories of contracts concluded by the administration: administrative contracts, and contracts governed by the *droit commun*: CHAPUT, René, *Droit administratif général*, 12th ed., Tome I (Paris: Montchrestien, 1998) 505-522.

²³ WILDE D'ESMAEL, Tanguy (de), “Les accords de coopération comme mécanisme de prévention et de solution des conflits : présentation de la nouveauté institutionnelle” in ALEN, André and al. (eds.) *Les conflits d'intérêts; quelle solution pour la Belgique de demain?* (Namur : La Charte, 1990) 90-122, 98 [de WILDE]

²⁴ CEREXHE, Étienne, “Les mécanismes de coopération dans un État fédéral” in *Présence du droit public et des droits de l'homme - Mélanges offerts à Jacques Velu*, Volume II (Brussels: Bruylant, 1992) 1019-1035, 1020 ff; de WILDE (1990) 91; KLEIN, Pierre, Un aspect du fédéralisme coopératif horizontal: les accords de coopération entre entités fédérées (Brussels: Centre d'études sur le fédéralisme, 1990) 1.

other systems.²⁶ In short, the lack of trust, combined with a sophisticated public law process, has led to the statutory and constitutional entrenchment of various cooperative techniques, which, in other federations, evolved in a less deliberate and formal manner, as the need arose.

1.1.4.1 Institutionalised cooperation

The Belgian legal order comprises an impressive number of formal cooperative mechanisms. Some are built in to the institutions themselves. For instance, half of the members of the Council of State and of the Court of Arbitration are Dutch-speaking, while the other half are French-speaking. Similarly, the federal Cabinet must be constituted of an equal number of French and Dutch-speakers.²⁷ This form of *bipolar* collaboration between the two main linguistic groups is the *raison d'être* of the particular architecture of federal institutions.²⁸

1.1.4.2 Cooperation through committees and conferences

The major political organ of cooperation between the various orders of government is the “Concertation Committee”, a multilateral body composed of the federal Prime Minister, five federal ministers, and six members of federated governments (on the *multipolar* model).²⁹ This Committee is equally divided between French and Dutch-speakers (on the *bipolar* model).³⁰ Its role is to solve so-called “conflicts of interests”, that is actions by one order of government in the federation that can have an adverse impact on another order. Its role is thus largely political. Yet, governments or legislative assemblies may refer an initiative by another order of government to the Committee. This can have the effect of freezing the adoption of a bill for up to four months, while a compromise is sought.³¹

²⁵ On the “legalist” Belgian tradition: *infra*, General Conclusions.

²⁶ This is not to deny the importance of a substantial degree of informal relations between administrations, mostly through the medium of relations within a single political party active in different orders of government.

²⁷ S.99, *Constitution*.

²⁸ To the extent that federated entities (as opposed to the two main sociological linguistic communities) are not directly represented in those institutions, the latter do not reflect the *multipolar* character the Belgian federation. Indeed, paradoxically, these parity-based institutions, which require constant cooperation, reinforce the bipolar nature of Belgium, which can itself be a source of tension. In this context, DELPÉRIÉ (2000, 4390) talks of “federalism of confrontation”:

²⁹ This Committee was instituted in the second stage of constitutional reform in 1980: s.31, 1980 OA; DELPÉRIÉ and DEPRÉ (1998) 303-311.

³⁰ In fact, a representative of the German-speaking Community also participates when matters of concern to the Community are involved: s. 67(3) 1983 OA; Internal regulations of the Concertation Committee, 1992, unpublished.

³¹ S.32(1)(4), 1980 OA. In the case of the Brussels-Region, there must be a majority vote in each of the linguistic groups, as well: s. 32(1)(3), 1980 OA. Another original protection mechanism is the “Alarm bell system”, pursuant to which ¾ of a linguistic group in the national Parliament can suspend the adoption of a bill which threatens relations between two Communities: s.56, *Constitution*. This procedure only applies within the Federal Parliament concerning federal legislation, although there is a similar procedure in the legislative Assembly of the Brussels Region: s.31 1989 DMA on Brussels.

Apart from the Concertation Committee, some fifteen sectorial “interministerial conferences” are also responsible for coordinating policies and sharing information between the various orders of government.³² Inspired by the German and Canadian model,³³ each such conference is composed of members of the federal government, as well as representatives of the executives of the relevant federated entities. They regulate intergovernmental relations in a wide variety of domains such as foreign relations, agriculture, finance, communications, scientific research, civil service, employment, health, education. They are both the main locus for intergovernmental cooperation and an obvious seat of negotiation in cases of disrespect for various cooperation arrangements. These conferences increasingly adopt “protocols”, in parallel to the more formal CAGs, which require formal government approval.

Similarly, a number of intergovernmental organs have also been set up to coordinate the elaboration and execution of public policy between various orders of government. This is notably the case on the French-speaking side of the country, with its complex and numerous institutions.³⁴ An astonishing number of working groups and committees have also been established to coordinate actions between the Brussels-Capital Region and the federal authorities to promote Brussels as a multiple capital (of the country, the French Community, Flanders, the Region and Europe) and its role as an international city.³⁵ All these organs are obvious fora for non-judicial resolution of conflicts concerning intergovernmental arrangements and formal measures.

1.1.4.3 Non-contractual forms of cooperation

The purpose of the present section is not to examine the range of “non-contractual” cooperative techniques in any detail.³⁶ An overview nevertheless shows the degree to which cooperative arrangements have been formally outlined and legislated in Belgium. For a

³² The only one provided by law is the Conference on Foreign Policy: s.31bis, DMA 1980. On the rules governing these various Conferences, see the *Circular concerning interministerial conferences* (MB 23.6.1992), and unpublished 1995 and 1999 versions.

³³ CEREXHE (1992) 1033.

³⁴ DUMONT, Hugues, “Les matières communautaires à Bruxelles du point de vue francophone” in WITTE, Else, et al., (eds.) *Bruxelles et son statut* (Brussels: Larcier, 1999) 557-594. This leads to a greater number of cooperation agreements between the French-speaking entities than between the Flemish and French-speaking entities.

³⁵ POIRIER, Johanne, “La coopération à Bruxelles : la dimension fédérale-régionale” in CATTOIR, Philippe et al., *Autonomie, solidarité et coopération : Quelques enjeux du fédéralisme belge au 21^e siècle* (Brussels: Larcier, 2002) 489-524, 508-513.

³⁶ For a detail of what he calls “classic cooperation”: MOERENHOUT, Roger, “De samenwerking tussen de federal Staat, de gemeenschappen en de gewesten” (1996-2000)”, (2001) 9 *TBP* 595-623, 603-609.

number of reasons cooperation in Belgium is characterised by an impressive degree of formalism, or “legicentrism”, by which I mean recourse to legislative forms and instruments.³⁷

Most of the non-contractual cooperative mechanisms are of a procedural nature: that is, they are meant to regulate behaviour between members of the federation and to introduce information sharing, consultative or co-decision proceedings. They constitute various forms of intervention by one order of government in the decision-making process of another order. There are literally dozens of legislated obligations to cooperate in one form or another. In an approximate order of increasing formality, the various techniques include information-sharing, non-binding consultation, “concertation” (a more active form of consultation), association of another entity in the drafting of legal norms, vetos, joint-decision-making, and representation of federal partners in organs created by another one.³⁸

The practical differences between these various forms of cooperative techniques are not always obvious.³⁹ A non-binding Protocol concluded between the Federal government and all the federated entities elaborates upon those techniques of cooperation. It specifies, for instance, which techniques require actual discussion and which can be accomplished writing.⁴⁰

The particularity of this web of legislated cooperative techniques is power given to courts to enforce them. Hence, the Court of Arbitration was given explicit jurisdiction to invalidate legislative instruments adopted without due respect for them,⁴¹ while the Council of State can similarly annul regulations adopted in violation of such compulsory cooperative devices.⁴² This, as we shall see, contrasts with the limited and often confusing jurisdiction of these Courts with regards to formal cooperation agreements.⁴³

1.1.5 A detailed legislative framework concerning IGAs in Belgium

The fear that no “spontaneous” collaboration would develop in the antagonistic federalisation process explains the plethora of cooperative mechanisms just described.

³⁷ On “legicentrism”: DIEUX, Xavier, *Le respect dû aux anticipations légitimes d'autrui: Essai sur la genèse d'un principe général de droit*, (Brussels/Paris: Bruylant/LGDJ, 1995) 47, 59, 76-77; LAJOIE, Andrée, *Quand les minorités font la loi* (Paris: PUF, 2002) 188 and 199; POIRIER, *Confins*, fn 76.

³⁸ For instance, ss. 5(2), 6(3) or 87(4), 1980 DMA.

³⁹ On the difficulties to distinguish between them: Senate Report (1999) Annex 12, 1014; LAGASSE (1999) 341-349.

⁴⁰ *Protocol governing various forms of collaboration between the Federal government and the governments of Communities and Regions* (27.10.1999) (unpublished), replacing 1995 published version (MB 5.10.1995).

⁴¹ S.124bis, 1989 DMA on the CA. Between 1996 and 2000, the CA annulled ten legislative instruments which were adopted in violation of compulsory cooperative measures.

⁴² S.14bis, CACS.

⁴³ *Infra*: Part II.

The perceived need for structured cooperation as a counter-balance for legislative decentralisation was even more pronounced with regard to formal cooperative agreements.⁴⁴ Those instruments are seen as logical, rational and legal constructs, essential to counter-balance the decentralisation process.⁴⁵ The extremely fragmented distribution of powers requires technical and often financial cooperation in order to maintain a degree of efficiency in policy-delivery. In many situations, consulting, “associating” with other members of the federation, or even involving them in decision-making or actual organs created by another member may not be sufficient. Coordinated legislative and executive action on matters of substance must also be ensured.

The formal mechanism of cooperation agreements was first introduced in the Belgian legal order in 1983 with the creation of the German-speaking Community.⁴⁶ This power was extended to the other federated entities and to the federal government in 1988-89, concurrently with the introduction of the formidable arsenal of cooperative techniques discussed above.⁴⁷ Section 92*bis* was inserted in 1980 DMA at this occasion. (This key provision will be henceforth be referred to as “s.92*bis*”). A few months later, the federal Parliament adopted an ordinary statute detailing the membership and procedures before so-called “cooperation tribunals”, original institutions meant to resolve disputes concerning the interpretation and implementation of formal cooperation agreements.⁴⁸ S.92*bis* expands with each new stage of constitutional reform. Despite these detailed statutory provisions, significant zones of uncertainty remain, notably with regards to the legal status of cooperation agreements. As we shall see, the existence of a detailed statutory framework concerning cooperative agreements contrasts sharply with the situation in Canada.

1.2 The constitutional, legislative and political foundations of IGAs in Canada

1.2.1 Major characteristics of the Canadian federation

The Canadian federation was instituted in 1867, by the coming together of three British colonies: New Brunswick, Nova Scotia and the “province of Canada” which subdivided at this point to form the provinces of Québec and Ontario. Over the following century, six other provinces joined the federation, or were carved out of territory that still

⁴⁴ WILDE d’ESTMAEL (de) (1990) 98.

⁴⁵ COENRAETS, Philippe, “Les accords de coopération dans la Belgique fédérale”, (1992) 16 *Adm publ* 158-202, 158.

⁴⁶ S.55, 1983 OA.

⁴⁷ The 1989 DMA inserted s.92*bis* to the 1980 DMA with regards to the central government and the federated entities, with the exception of the Brussels-Capital Region, which obtained this power through s.66, 1989 DMA on Brussels. In the rest of this thesis “s.92*bis*” will be taken to include the equivalent provisions applicable to the GC and the BCR.

belonged to the British Crown.⁴⁹ Today, Canada is composed of ten provinces and three northern territories, whose competences largely follow those enjoyed by provinces.⁵⁰

The federal system set out in 1867 was rather centralised. Some of the features of the formal 1867 Constitution are so “un-federal” that in his classic work, Wheare actually disqualified Canada as a federation. Over time, several of the centralising features, such as the power of federal authorities to “disallow” provincial legislation, have fallen into desuetude and are unlikely to ever be used again.⁵¹

As a result, Canada is now one of the most decentralised federations.⁵² Four main factors explain this transformation:⁵³ judicial interpretation which, in the early days of the federation, was favourable to the provinces; the lack of proper regional representation in central institutions which has resulted in the strengthening of provincial powers, particularly in the richer provinces and in Québec; the fact that the areas of provincial responsibility (discussed below) which were secondary at the origins of the federation, have become the most important areas of public policy in the late 20th century (health, education, for instance); and finally, the nationalist movement in Québec which developed in the post-war era and has led to demands for decentralisation from which other provinces have benefited indirectly. Fiscal imbalance between federal and federated orders has a definite centralising effect, notably through the use of the federal spending power.⁵⁴

By opposition to the incessant constitutional reforms that Belgium has undergone in the last thirty years, Canada’s constitutional arrangements are particularly resistant to major

⁴⁸ *Ordinary Act on the Tribunals mentioned in s.92bis (5)(6) and 94(3) of the 1980 DMA*, 1989, MB 24.01.1989 [“1989 OA on cooperation tribunal”].

⁴⁹ Or private corporations! Manitoba joined in 1870, British Columbia in 1871, Prince-Edward Island in 1873, Alberta and Saskatchewan in 1905 and Newfoundland in 1949. The remaining land is divided between three federal territories with substantial autonomy: the Yukon, Nunavut and the North West Territories. On processes of adhesion: WOEHLING, José, “L’évolution constitutionnelle du Canada et du Québec de 1867 à nos jours” in MORIN, Jacques-Yvan, WOEHLING, José, *Les Constitutions du Canada du Régime français à nos jours*, Tome 1, 2^e ed. (Montréal: Thémis, 1994) 123-600, 400-408. TREMBLAY, André, *Droit constitutionnel canadien et québécois, Documents* (Montréal: Thémis, 1999) 239-560.

⁵⁰ The major distinction between provinces and territories lie in their “constitutive autonomy”. The competences of the latter are not constitutionally protected: they are outlined in federal legislation, which could be altered unilaterally (s.54, *Constitution Act 1871*). Territories are not included either in the required provincial consent for major constitutional amendment.

⁵¹ This power was last used in 1943: HOGG (1998) 118 ; see also: TREMBLAY, André, *Droit constitutionnel : principes*, 2nd ed., (Montréal: Thémis, 2000) 219-221.

⁵² Although in some cases Canada remains particularly centralised (foreign affairs, for instance). Placing federations on such a continuum is perilous, given the lack of specific index: WATTS, Ronald, *Comparing Federal Systems*, 2nd ed., (Kingston: IIGR, 1999) 71-72.

⁵³ CAMERON, David R., “Canada”, in *Forum of Federations, Handbook of Federal Countries* (Montréal-Kingston: McGill-Queen’s University Press, 2002) 106-119.

⁵⁴ On fiscal imbalance: CONFERENCE BOARD OF CANADA, *Fiscal Prospects for the Federal and Provincial/Territorial Governments* (01.08.2002): www.conferenceboard.ca. For examples of IGAs used as tools of the spending power: *infra*: Chapter 3.

change. This is in spite of the constitutional debates and negotiations that have consumed a significant portion of political energy since the 1960s. In fact, Canada and Belgium share a similar “constitutional industry”, but one which produces quite distinct results, or lack of them. One momentous reform took place in 1982, when the Canadian Constitution was “repatriated”: the Constitution is no longer an Act of the Westminster Parliament but a Canadian document. In addition to including “Canadian based” amending formulas,⁵⁵ the 1982 *Constitution Act* also enshrined a *Charter of Rights*, recognised aboriginal rights, some minority language rights and the multi-cultural character of Canada. Remarkably, the 1982 did not modify or modernise the fundamental federal structure, which is still contained in the 1867 *Constitution Act*, nor did it recognise any special place or status for Québec.

Eight major characteristics of the Canadian federal system provide a useful background to the analysis of IGAs. First, as the previous sub-section suggested, Canada is the result *both* an *unification* process (provinces coming together originally, or joining an existing federation), *and* of *dissociation* (the division of the province of Canada into two federated units as well as the carving out of provinces and territories out of larger entities). This double process is often underestimated, particularly in Europe, where Canada is often generally presented as a typical example of a “federalism of union”. In fact, the union and dissociation origins of the current structure explain the second major characteristic of the Canadian federal system, its *co-existing centrifugal and centripetal* tendencies.

We have seen that the logic of the Belgian federal system is largely bipolar, while the institutions are multipolar. The Canadian federation is less easily defined. It is certainly largely influenced by the linguistic duality of the descendants of the original European settlers. Nearly a quarter of the 31 million Canadian citizens are French-speaking (although that proportion is diminishing); and 60% have English as a first language. Yet, Canada being a land of immigration, the remainder have a vast number of languages as mother tongues.⁵⁶ Hence, while the history of Canada is largely bi-cultural, its contemporary composition rests of multiple centres. This is particularly the case since greater attention and respect have been given to the Canadian First Nations. Hence, and this is the third major characteristic:

⁵⁵ There are five different amendment procedures, requiring different types of provincial consent: ss. 41-45, *Constitution Act*, 1982.

⁵⁶ CAMERON (2002) 107.

the *bipolar* logic (French – English)⁵⁷ is thus constantly challenged by a weaker *multipolar* one, in which the domination of the English language is undeniable.⁵⁸

Fourthly, despite this bi- or multicultural dimension, the fundamental federal structure is classically territorial. While the rights of some minorities have received a significant degree of constitutional and legislative protection, the system does not include anything similar to the overlapping Communities and regional institutions of Belgium. In this sense, the *institutions* are clearly *multipolar* in that there are thirteen distinct political entities which – for our purposes – have the potential for cooperating between themselves, or with the central authorities.

Fifthly, the so-called “bi-juridical” nature of Canada is relevant to this study.⁵⁹ Indeed, for historical reasons, Québec has retained a civil-law based private law regime, while the common law applies in other provinces and territories. There is very little “federal” common law.⁶⁰ Consequently, a contract to which the federal government is party will normally be governed by the law of the province in which it is concluded.⁶¹

The foregoing is but one illustration of the asymmetrical nature of Canadian federalism. This sixth characteristic defies the almost fanatical opposition to any further official recognition of asymmetry in dominant Canadian political circles, in which it is understood as “preferential treatment” and a contradiction to the so-called “equality of provinces”. Other asymmetrical features include New Brunswick’s status as the only officially bilingual province in the country and the various conditions of “entry” of different provinces into the Canadian federation which reflected historical reality and the power relations of the period.⁶² As we shall see, IGAs represent a useful tool for setting up asymmetrical arrangements in a less visible manner.

The seventh characteristic lies in the strength of central authorities, particularly by contrast to the Belgian situation. Indeed, the ever-decentralising nature of the Belgian

⁵⁷ Formally, some recognition was given to the French-English polarity in the Constitution: both languages can be spoken in Parliament and all federal legislation is adopted in both languages (ss. 17-18, *Constitution Act*, 1982). Informally, custom, the “French fact” has been taken into account in federal institutions: some, as a non-binding custom, the Prime Minister of Canada is at least bilingual, three members of the Supreme Court originate from Québec and there is generally an alternance between a French and an English speaking judge as Chief Justice: TREMBLAY (2000) 18-19.

⁵⁸ MORIN argues that the 1867 Constitution was both a multilateral agreement between 3 or 4 provinces and a bilateral one between two peoples, *in* MORIN and WOEHLING (1994) 153-154.

⁵⁹ “Le bijuridisme (c’est-à-dire l’expression simultanée d’une norme dans deux traditions juridiques) peut conduire au dialogue entre les traditions [...]”; JUTRAS, Daniel, “Énoncer l’indicible : le droit entre langues et traditions”, (2000) 4 *RIDC* 781-796, 781.

⁶⁰ *Québec North Shore Paper Co. v. Canadian Pacific*, [1977] 2 SCR 1054; *McNamara Construction v. The Queen*, [1977] 2 SCR 654.

⁶¹ Or be determined by some other criteria of conflict of laws.

⁶² Those were introduced through “constitutionalised” agreements: *infra*, 2.2.3.2.

constitutional reforms and the parity-based institutions signify that the center is always dependant on a large consensus between the major components of the federation. Not so in Canada, where, despite an informal regional representation in cabinet – and a particularly weak regional representation in Parliament due to the electoral system – the center has its own dynamic. With very important fiscal power, a centralising ideology and a strong bureaucracy, “Ottawa” is not the sum of the parts, but a distinct partner. It stands at arm’s length from the provinces.⁶³ This is particularly the case since the Senate is a Chamber of federal patronage, which does not represent the interest of the provinces or territories.

Finally, the financial and political power of certain provinces, and the almost autonomous nature of the federal institutions (as opposed to some sort of representation of the constitutive units) generate a *competitive* edge to federal governance in Canada. Provinces compete for private investment in a way that is inconceivable in Belgium. They vie for qualified personnel (in health care, for instance). The federal government and the provinces seem to be in regular struggle to occupy politically profitable field of public policy, such as social protection. IGAs represent one way to harness this competition.⁶⁴

1.2.2 The formal distribution of competences

In Belgium, Communities and Regions have enumerated powers, the federal government having (for the time being) maintained residual powers. The Canadian constitution uses a different method of distributing powers: both the federal and the provincial powers are enumerated in distinct lists, with a third – short – list of concurrent competences.⁶⁵ When a matter is not explicitly listed, courts will first verify whether it can be reattached to the provincial competence over “property and civil rights” or “local affairs” in the province. If not, it will be considered to be federal. In this sense, there are two levels of residual powers.⁶⁶

Classically, the federal government has exclusive competence in matters of defence, nationality, currency, postal service, and Indian affairs. It also has exclusive competence over banking, inter-provincial transport and trade, aeronautics, telecommunications and unemployment insurance. Provinces have exclusive competence over education (subject to some minority protection rights), municipalities, real property, private law and natural resources.

⁶³ PAINTER, Martin, “Intergovernmental Relations in Canada: an Institutional Analysis” (1991) 24 *Can J Pol Sci* 269-287, 284.

⁶⁴ IGAs concerning the marketing of agricultural products, for instance: *infra*, Chapter 5.

⁶⁵ Ss 91-95, *Constitution Act*, 1867.

⁶⁶ HOGG (1998) 378.

Despite the limited list of concurrent powers, and the existence of two fairly long lists of exclusive federal and provincial powers, significant domains of public policy are shared between the two orders, to the extent that each can intervene using their respective competences.⁶⁷ IGAs are increasingly being used to sort out responsibilities in such cases of jurisdictional overlapping.

As mentioned above, each order of government has its own administration in charge of implementing its own legislation. The one exception is criminal law, the substance of which is federal (the determination of the actual offences), but which is administered by the provinces. Justice is somewhat intermingled also, the administration of justice being essentially provincial, although the Superior Court and Court of Appeal judges are designated by the federal government.

As in the case of Belgium – and many other federations – the power over international relations is particularly contentious. The power to conclude and ratify treaties lies with the federal executive. However, the power to implement a treaty in the domestic legal order follows the internal distribution of powers. Concretely, this signifies that, by contrast with the situation in Belgium, the federal government can conclude a treaty in on any matter whether federal or provincial. However, it will not be able to transform its international obligations into legislation, if the matter at stake falls within the provincial sphere of competences.⁶⁸ Cooperation during the negotiation stage is thus essential to secure provincial consent to treaty obligations that only they have the power of implementing. By contrast with the Belgian situation, this cooperation is largely informal.

1.2.3 An overview of the Canadian court system

By opposition to Belgium, which has three distinct judicial orders (constitutional, administrative and the civil/criminal), the Canadian judicial system is essentially unified *ratione materiae*. It is however, divided along territorial lines. This creates particular problems in the context of IGAs.

In addition to provincial courts, each province has a Superior Court with inherent jurisdiction and a Court of Appeal, whose judges are appointed by the federal government. The Supreme Court, whose nine judges are also appointed by the federal government, reigns in final appeal over all of them. The Supreme Court thus has the combined jurisdictions of the Belgian Court of Arbitration, Council of State and Court of Cassation.

⁶⁷ Concurrence implies that in case of conflict, the norms of one order will take precedence (generally, the federal, although concurrence is in favour of provinces in the case of pensions: s.94A, *Constitution Act, 1982*).

⁶⁸ *Canada v. Ontario*, (1937) A.C. 326 (the *Labour Convention's case*).

This simple pyramidal structure basically applies to any matter falling within provincial powers. Hence, Superior Courts can review the constitutionality of provincial legislative and regulatory instruments. They are the main locus of judicial review of the legality of provincial regulatory instruments and administrative acts.⁶⁹ They have the main competence in matters of criminal, commercial and private law.

The situation is more complex in the case of matters of federal competence. The determination of the jurisdictional border between the Federal Court (which has limited powers) and the Superior Courts of the provinces (which are courts of general jurisdiction) has been the object of momentous rulings, and a number of grey areas remain. As Courts of general jurisdiction, provincial Superior Courts can rule on the constitutionality of federal acts and regulations. However, the Federal Court of Canada, whose mandate is to implement federal legislation and review the legality of federal administrative action, can also rule on the constitutionality of federal law, if the matter arises incidentally in the course of proceedings.

As we will see, these grey areas affect IGAs because provincial governments may not be sued in Federal Court and as a rule not in the courts of other provinces either.⁷⁰ The problem is even more acute in the case of judicial review of administrative action taken pursuant to IGAs, since the Federal Court is responsible for reviewing the legality of federal officials, while Superior Courts oversee provincial ones. Which court has jurisdiction when the act in question is presumably a joint one? The dual character of the Canadian judicial system is particularly ill-adapted to cooperative federalism.

1.2.4 Cooperative federalism in Canada

The expression “cooperative federalism” was generally used to describe intergovernmental relations in the 1960s. It referred to intense degree of consultation between the federal and provincial governments and the establishment of major co-financed programmes, notably in the area of social assistance, health care or further education.⁷¹ “Cooperative federalism” or “flexible federalism” has nevertheless been associated with federal dominance in intergovernmental relations, notably through the use of the spending

⁶⁹ Provinces can establish specialised administrative law courts, but appeal must lie with the Superior Court.

⁷⁰ S.19 of the Federal Court Act provides a partial solution, although serious doubts have been raised regarding its constitutionality: *infra*, chapter 5.

⁷¹ SIMEON (1972); DYCK, Rand, “The Canada Assistance Plan: The Ultimate in Cooperative Federalism” (1976) 19 *Can Public Admin* 587-602, 587-88.

power.⁷² Over the last decade the literature in the field of public policy and political science has often substituted the phrase “collaborative federalism” in an attempt to capture the reality of less hierarchical forms of “cooperation”.⁷³ As we shall see, however, the change of label is more a matter of wishful thinking than the description of a changing reality.

Whatever the expressions actually used, and the evaluation that is made of the impact of the interaction between orders of government on democratic governance and the basic premise of federalism, the Canadian system is replete with various techniques of intergovernmental relations. They enable federal partners to act jointly, transfer the exercise of certain powers to one another, share information, consult and resolve disputes. Intergovernmental agreements are one of the most formal means to do so, but they are weaved through a rich spectrum of other techniques. These techniques have been developed on an *ad hoc* basis and are more diffuse than in the Belgian context. There is no repertoire of their use in various domains. The following provides a cursory description of the principal ones.

1.2.4.1 Institutionalised cooperation

In Belgium, “institutionalised cooperation” refers essentially to the means through which the two major cultural groups are represented in federal institutions. Again, nothing is quite as systematic in Canada. By tradition, there is some regional representation in the Senate (whose members are all appointed by the federal government) and in the federal Cabinet. While they bring their own concerns and sensibility to institutions in Ottawa, “regional” Senators or Cabinet members do not speak for constitutive units and are often at odds with governments of their province of origin. In brief, intergovernmental relations in Canada are largely informal and there is no equivalent to the various parity rules that have a constitutional or quasi-constitutional basis in Belgium.

1.2.4.2 Committees and Conferences

The practice of intergovernmental conferences dates back to the 19th century in Canada. They developed informally, as political crisis and public policy required and power relations allowed.⁷⁴ Literally hundreds of intergovernmental meetings take place each year,

⁷² YUDIN, David W.S., “The Federal Spending Power in Canada, Australia and the United States “, (2002) 13 *NJCL* 437-484, 473-480.

⁷³ LAZAR, Harvey, “Non-constitutional Renewal: Towards a New Equilibrium in the Federation” in *The State of the Federation 1997* (Kingston: IIGR, 1998) 3-35. For a denunciation of the power play behind so-called cooperative federalism:

⁷⁴ The only legal provision concerning these Conferences is found in s.37(1), *Constitution Act 1982*, which provided that First Ministers Conference would be held three and five years following its adoption. This was presumably to seek to rally Québec which had refused to sign the new

at the ministerial level and at various levels of the bureaucracy.⁷⁵ The logistics of a vast number of them is provided by the Secretariat for Canadian Intergovernmental Conferences.⁷⁶ They play a number of roles: from information sharing to actual joint-decision making. They are used to develop policies, decide on methods of implementation and report on results. They are the prime locus for negotiating and finalising formal agreements.

1.2.4.3 Conditional legislation and legislation by reference

A number of legislative techniques have been developed over the years to bring some flexibility to the “dual” character of the Canadian system in which each order has its own legislative and executive branch, as well as to allow for coherent policy-making in areas of interlocking competences. None of these techniques have a textual foundation, as formal cooperative techniques do in Belgium. The result is a lack of transparency about their use. Courts are remarkably tolerant of these schemes, which often end up blurring the formal distribution of competences. The only limit strictly imposed is that one legislative assembly may not delegate its powers to another.⁷⁷ Courts have shown deference to alternative routes for attaining similar results.

One is to subject the coming into force of legislation to an action by another order of government.⁷⁸ For instance, pursuant to an intergovernmental scheme, federal statutory provisions pursuant to which the central government agreed to finance half of the social assistance cost incurred by a province were conditioned on the existence of provincial legislation. Amendment to federal regulations was also made conditional of provincial consent.⁷⁹ This is thus a form of coordinated action, although it formally uses unilateral legislative techniques.

Another is for a legislative assembly to “incorporate” the legislation of another. Legislation by reference is always revocable: the legislature having simply to abrogate the statute that incorporated the legislation of the other order. If the incorporation of the

Constitution, and possibly Aboriginal leaders, who were left out of the constitutional process altogether.

⁷⁵ SIMMONS, Julie, “Securing the Threads of Cooperation in the Tapestry of Intergovernmental Relations: Does the Institutionalization of Federal-Provincial Territorial Ministerial Conferences Matter?” in INSTITUTE OF INTERGOVERNMENTAL RELATIONS, *The State of the Federation 2001-2002* (Kingston: IIGR, 2003 forthcoming).

⁷⁶ www.scics.gc.ca.

⁷⁷ *AG Nova Scotia v. AG Canada*, [1951] SCR 31; *R. v. Furtney*, [1991] 3 SCR 89, 102-03; MAGNET, Joseph Eliot, *Constitutional Law of Canada : Cases, Notes and Materials*, 7th ed. (Edmonton: Juriliber, 1998) 85-107; ISSALYS, Pierre, LEMIEUX, Denis, *L'action gouvernementale* (Cowansville: Yvon Blais, 1997) 19.

⁷⁸ *Lord's Day Alliance of Canada v. A.G. B.C.*, [1959] SCR 497.

⁷⁹ *Re Canada Assistance Plan*, [1991] 2 SCR 525 (the “CAP Reference”). Federal legislative action was not curbed, however, which gave rise to a major federal-provincial dispute examined in Part II.

legislation of the other order of government refers to legislation as it evolves, the process is almost undistinguishable from inter-parliamentary legislation. Yet, for the Supreme Court of Canada, this does not amount to a delegation of law-making power, but rather to “the adoption by Parliament, in the exercise of its exclusive power, of the legislation of another body as it may from time to time exist”.⁸⁰

1.2.4.4 Interdelegation

If the express delegation of legislative power from one order of government to another is unconstitutional, there are no obstacles to the delegation of regulatory power or administrative functions to another order of government. In other words, a provincial statute can provide that its detailed application will be outlined through regulatory instruments elaborated by the federal government (although the reverse proposition seems more frequent). For instance, the (federal) Criminal Code prohibits certain forms of lottery. An exemption is provided however, in the case of charitable organisations that have a *provincial* license, which is granted on the basis of provincial regulation. This is permissible, to the extent that the “delegate” remains subordinate and the delegation is subject to revocation.⁸¹ Similarly, the federal government has delegated to various provincial administrations the responsibility for issuing contraventions for violations of some federal statutes, and prosecuting these violations.⁸²

Such delegations enhance the flexibility of government, and have the potential for reducing overlapping and streamlining public services. They do raise a number of issues, however in terms of accountability, Ministerial responsibility, civil liability and judicial review. If a provincial police officer commits a tort in the process of issuing or prosecuting a contravention to a federal statute, which of the provincial or federal Crown is liable? Does the Superior Court or the Federal Court have jurisdiction to assess the legality of administrative actions of such delegated arrangements? These issues are of particular concern in the present context, given the role played by IGAs in these schemes.⁸³

1.2.5 A limited normative framework concerning IGAs in Canada

By contrast to the detailed legislative framework governing cooperation agreements in Belgium, there are hardly any rules of general application concerning IGAs in Canada. Some provinces (such as Québec, Newfoundland or Alberta) provide basic statutory rules

⁸⁰ *Coughlin v. Ontario Highway Transport Board*, [1968] SCR 569, 575.

⁸¹ *R. v. Furtney*, [1991] 3 SCR 89.

⁸² *Contravention Act*, SC 1992, c. 47: *infra*, Chapters 3 and 5. See also *Re Agricultural Products Marketing*, [1978] 2 SCR 1198.

⁸³ *Infra*, Chapter 5.

concerning the authority to conclude such agreements, and the role of intergovernmental relations Departments in keeping copies of them. There are no such federal legislative rules.⁸⁴ This makes the appraisal of the positive law regarding IGAs a more complex exercise than in the case of Belgium.

Conclusions

Both Belgium and Canada are complex federal regimes, with closely interconnected or overlapping competences. Effective policy-making has led to the development of a vast array of cooperative techniques. In Belgium, this was done in an explicit manner, generally through quasi-constitutional legislation, as a counterpart to the transformation of the unitary State into a federation. By contrast, cooperative federalism in Canada developed in a haphazard manner, which renders the various techniques used more opaque. The judicial system of each federation presents challenges in the context of inter-federal relations, which will become apparent in Part II of the thesis. The next chapter examines more specifically the legislative framework and the practice of IGAs in both federal regimes.

⁸⁴ Apart from specific authorisations given to Ministers to conclude IGAs, but this is done in very general terms.

CHAPTER 2: THE LEGAL FRAMEWORK AND PRACTICE OF IGAs

Introduction

The present chapter sketches the practice of intergovernmental agreements in the Belgian and Canadian federations, as well as the principal – in the Canadian context, the few - legislative provisions relating to IGAs. The purpose is to give a sense of the range of policy areas affected by IGAs, as well as to introduce some key concepts and classifications that will be referred to throughout the remainder of the thesis.

2.1 Typology of IGAs

Faced with the magnitude of the practice of intergovernmental agreements, analysts have proposed a number of classification schemes. Beyond their descriptive, heuristic or pedagogical interest, some classifications have – at least in the Belgian legal order - constitutional and legal significance.

2.1.1 Typology based on the object or subject matter

It is of course possible to classify IGAs according to their content and purpose. Chapter 3, which examines the various functions played by IGAs, is a variation of this theme. Similarly, IGAs can be classified pursuant to the public policy area covered. This is a difficult exercise to do in a “wholesale” manner, because registries generally organise agreements pursuant to the Departments who conclude them and not to a specific field of public action. Indeed, classifying agreements pursuant to the domain covered requires a detailed reading of each agreement. An agreement concluded between two departments of agriculture, for instance, could certainly touch land use, environmental protection, employment measures and so on. This can be a useful exercise for the analysis of the impact of IGAs in a certain policy domain, but one that could not be systematically undertaken in the present context.

This being said, the following provides an indication of the spectrum of policy areas covered by IGAs.

Section 92 *bis* of the 1980 DMA (s.92*bis*) explicitly authorises the Regions, the Communities and the central authorities to conclude agreements between themselves, “*notably in view of the creation and common management of common services and institutions, the joint exercise of competences or the development of joint ventures*”.¹ As this list is not exhaustive, agreements can - and do - cover a large array of topics. The scope

has been very wide both in terms of policy areas and in terms of style. Agreements have been used to create common organs and regulate the transfer of civil servants following the successive stages of devolution.² Some are technical and detailed, some simply amount to a "declaration of intent". According to the registry kept by the Secretariat to the Concertation Committee, the distribution is roughly the following:³

- General = 5
- Economy and Energy = 8
- Communication, infrastructure and telecommunications = 33⁴
- Research = 9
- Foreign Policy = 12
- Finances = 17
- Home Affairs = 5
- Employment (including professional training) = 28
- Agriculture and Small and Medium Size Businesses = 3
- Public Health = 17
- Environment = 18
- Education = 7
- Youth Protection = 5
- Social Protection = 8

TOTAL : 175

In Canada perhaps even more than in Belgium, very few policy areas are free from intergovernmental agreements. They deal with the environment, health, education, service delivery to aboriginal communities, transport, natural resources, water management, the promotion of official languages, support to immigrant populations, labour market, road constructions. They are particularly common as tools for channelling federal funds for programmes managed by the provinces.

To give an indication of the extensive use of IGAs by Canadian authorities, the following is a breakdown of the various federal Departments and Agencies identified as responsible for the conclusion of IGAs:⁵

- Foreign Affairs and International Trade = 11
- Indian and Northern Affairs = 55
- Canadian International Development Agency = 2

¹ S.92*bis*. My translation.

² AC relatif à la gestion administrative des charges du passé en matière d'enseignement (FED + Fr C + FI C), 07.08.89 (05.10.89); AC relatif au personnel du Fonds national de garantie des bâtiments scolaires (FED + 3C), 07.08.89 (05.10.89).

³ To date: 01.10.03. This classification is based on the various interministerial conferences to which the federal order of government is always associated. Inter-regional and inter-Community IGAs are under-estimated.

⁴ Including the 8 codicils ("Avenants" » to the Federal-regional Agreement on Brussels of 1993.

⁵ Federal Registry: 15.02.2003.

- Atlantic Canada Opportunities Agency = 11
- Parks Canada = 28
- Agriculture and Agri-Food Canada = 84
- Veterans Affairs Canada = 11
- Privy Council Office = 2
- Citizenship and Immigration = 27
- Treasury Board = 14
- National Defence = 13
- Human Resources Development Canada = 106
- Canada Economic Development for Quebec Regions = 6
- Western Economic Diversification Canada = 4
- Environment Canada = 66
- Finance Canada = 30
- Industry Canada = 18
- Justice Canada = 58
- Canadian Heritage (culture) = 46
- Fisheries and Oceans = 27
- Natural Resources = 25
- Health Canada = 41
- Canada Mortgage and Housing Corporation = 36
- Solicitor General of Canada = 1
- Statistics Canada = 14
- Transport = 47
- Public Works and Government Services = 16
- TOTAL = 799

2.2.2 Typology based on actors

Agreements are either *bilateral*, *multilateral*, or “omnilateral”,⁶ that is, agreements to which all members of a federation are party. Sometimes the federal government will conclude a series of identical bilateral agreements with different federated entities, rather than a major omnilateral one. This strategy is often pragmatic. Such arrangements are more easily negotiated and eventually modified than agreements requiring every party’s approval. The distinction does not have substantial consequences, and the terms are more descriptive than normative.

Even when federal-provincial agreements have similar objectives, it is not uncommon for the federal government to negotiate bilateral agreements with each province individually. This is notably the case of Framework agreements that are completed by province-specific ones (“stand alones”).⁷ To give an idea, of the 880 federal-provincial agreements found in the PCO registry:

- 604 are “stand-alone” bilateral agreements

⁶ GARCIA MORALES (1998) 42.

⁷ BLACKMAN (1993) 5-6.

- 112 are bilateral agreements which complete framework agreements
- 4 are regional (with the Western or Atlantic provinces)
- 25 are multilateral
- 12 are “Canada-wide”, that is with all provinces and territories (“omnilateral”)
- 123 include third parties as signatories: aboriginal groups or municipalities, for instance.

The terms “vertical” and “horizontal” are regularly used to describe agreements between the federal order of government and federated entities, or between entities themselves, and this is how I use them in this thesis.⁸ It should be noted, however, that the adjective “vertical” suggests a kind of subordination which does not reflect the formal constitutional relationship between the federal order and federated entities in Belgium or Canada. In other words, I use the term in a descriptive, not a normative, manner.

2.2.3 Typology based on legal criteria

Classifying agreements pursuant to legal criteria anticipates somewhat on the core of this thesis, which is to assess the status of IGAs. Yet, a number of distinctions flow from the legislative framework applicable to Belgian cooperation agreements and should be invoked in the context of a presentation of that framework. Their eventual significance in terms of legal status will be discussed in Part II. The following is thus mainly descriptive. It is meant as an introduction to the several issues analysed in the following chapters.

2.2.3.1 Typology based on legal criteria in Belgium

The formal insertion of cooperation agreements in the Belgian legal order in 1988-89 was accompanied by a number of dichotomous distinctions: compulsory vs. optional; “legislative” or not; formal cooperation agreement vs. “mere” protocol.

• “Compulsory” and optional agreements

S.92*bis* of the 1980 DMA grants a substantial degree of freedom to the various components of the Belgian federation concerning matters over which they can conclude cooperation agreements, so long as their respective constitutional powers are respected.⁹ Such “optional” agreements correspond to the institution of intergovernmental agreements in other federal regimes. With regards to policy areas that seemed particularly vulnerable to constitutional decentralisation, however, the 1980 DMA as amended introduced an original

⁸ This is notably the case of the Swiss, Spanish and Belgian legal writing.

⁹ *Infra*, Chapter 4.

instrument, the so-called “*compulsory*” cooperative agreement.¹⁰ This apparent oxymoron can only be understood in the political context in which this original institution arose.

In some cases, negotiators of constitutional reforms only consented to decentralise particularly sensitive constitutional powers on the condition that the field would be subject to formal and legally binding agreements between the newly responsible entities. Hence, the 1988-89 phase of “federalisation” – which saw the formal introduction of cooperative agreements in the Belgian legal order – led to the regionalisation of powers concerning major infrastructures, including roads, waterworks and telecommunications.¹¹ “Compulsory agreements” were introduced in the 1980 DMA at that point, so that a number of technical issues were settled before the transfer of competences to regions became effective. To give a concrete example, the Flemish Region was concerned that the regionalisation of waterworks could mean that the failure of the Walloon authorities in the South to properly maintain rivers or dams could have detrimental effects in the Northern part of the country, through which the rivers flow to reach the North Sea. The transfer to competence was thus conditioned on an agreement between Regions.

The term “compulsory” here is something of a misnomer. Identified parties to such agreements do not actually have an obligation to conclude the agreement. However, until a particular issue has been the object of an agreement identified as “compulsory”, the *status quo ante* is maintained, despite the transfer of competences actually recognised in the double-majority legislative instruments.¹² Concretely, this generally means that federal authorities retain full jurisdiction over a policy area that has been constitutionally transferred to federated entities, until compulsory agreements over this area have been concluded.¹³ In other words, until the conclusion of a “compulsory agreement”, the transfer of competence agreed upon – and even inserted in the quasi-constitutional legislation – remains contingent.

From a legal perspective, it is important to distinguish agreements that are officially required before a constitutional transfer of competence becomes effective, from those which parties must conclude for reasons of effective public management, including those required in order to ensure a coherent transposition of European directives into the Belgian legal

¹⁰ The Austrian federal system also has a version of compulsory IGAs: GARCIA MORALES (1998) 88.

¹¹ And the actual transfer of competences over education to Communities, which had formally taken place in 1980.

¹² S.94(2)(3), 1980 DMA.

¹³ The status quo does not only favour federal authorities, however. Hence, the transfer, in 1994, of certain competences from the French Community to the Walloon Region and to French Community Commission of the Brussels Region was also made conditional on the conclusion of compulsory cooperative agreements between the three parties: LAGASSE, Charles-Etienne, *Les nouvelles institutions politiques de la Belgique et de l'Europe*, 2nd ed. (Namur: Artel, 1999) 351.

order.¹⁴ In the remainder of this thesis, the expression “compulsory agreement” is used to designate agreements that must be concluded pursuant to s.92*bis* of the 1980 DMA, the absence of which has the effect of suspending a constitutional transfer of competences.

Optional and compulsory agreements thus play different roles in federal Belgium. The first are instruments allowing for cooperation between orders of government that are exercising their own constitutional competences. The second are undeniable instruments of the “federalisation” process. Each new round of reform carries its own generation of “compulsory agreements”, which are added to the list contained in s.92*bis*.

- **Agreements requiring legislative assent**

All agreements are concluded by members of the various Executives.¹⁵ However, s.92*bis* specifies that legislative assent is required in the case of all agreements which:

- * have financial implications for the signatories;
- * create obligations for individuals; or
- * deal with matters that may only be governed by legislative (as opposed to regulatory) instruments.

In fact, until 1993, those criteria were used to distinguished international treaties requiring legislative approval from those that did not. In the 1993 round of constitutional reforms, those criteria were transposed to cooperative agreements. Oddly, at the same time, the rules were changed so that henceforth, all treaties must officially receive parliamentary assent prior to its coming into force within the Belgian legal order.¹⁶ The previous uncertainty concerning the necessity of obtaining parliamentary assent with regards to treaties now affects the role of legislative assemblies with regard to cooperative agreements. Some suggest that the transposition of the rules previously applicable to treaties to cooperative agreements had been requested by Flemish nationalists, in an effort to assimilate federated entities to sovereign States as much as possible.¹⁷ Hence, measures meant to ensure

¹⁴ AC concernant la maîtrise des dangers liés aux accidents majeurs impliquant des substances dangereuses (FED + 3R), 21.06.99 (12.10.00, 16.06.01): JANS, Theo Maarten, TOMBEUR, Herbert, “Living Apart Together : The Belgian Intergovernmental Cooperation in the Domains of Environment and Economy” in BRAUN, Dietmar (ed.) *Public Policy and Federalism* (Aldershot: Ashgate, 2000) 142-176.

¹⁵ *Infra*, 2.4.1.

¹⁶ Compare new s.167 with previous s.68 of the *Constitution*. On this: SALMON and DAVID (2001) 85 ff. Given the correspondence between domestic and international competences, treaties which deal with matters falling within the competences of federated entities must receive the assent of the legislative assemblies of those entities: s.167(3), *Constitution*.

¹⁷ Information obtained in the course of confidential interviews.

greater parliamentary control and transparency were, in fact, introduced for their symbolic value.¹⁸

Because a significant number of cooperative agreements have financial implications, these new rules have led to a multiplication of agreements requiring assent. This, in turn, has generated delays and ambiguity concerning the status of agreements which have received legislative assent by one party but not yet by another.¹⁹ The third criterion also creates a degree of uncertainty, since the border between norms which must be approved by legislative instruments - as opposed to regulatory ones - is a fluid and controversial one, even outside the context of cooperative agreements.²⁰

To avoid any confusion, a *Circular relative to the entry into force and to the monitoring of cooperative agreements*, adopted by the Concertation Committee in 1999,²¹ specifies that any agreement requiring legislative approval should contain a clause to that effect. This is rarely the case.²² Senior civil servants hold that since 1993, executives have acted with prudence and require parliamentary approval of far too many agreements. In the 1988-1993 period, 15% of cooperative agreements were subject to parliamentary assent.²³ From 1996 to 2001, this rate had reached two-thirds of agreements.²⁴ Even then, a number of agreements that should receive legislative assent, do not.²⁵ Securing multiple parliamentary assents creates delays, paperwork, and a degree of transparency that governments often prefer to avoid. This is true even if the risk of refusal of legislative assent is extremely low, given that all governments are constituted of coalitions that govern a majority in the legislative assembly.

The distinction between agreements requiring assent and others entail legal consequences in terms of their status *inter partes*, their potential legal force *erga omnes*, their place in the hierarchy of norms, as well as the courts of competent jurisdiction to, notably, rule on their constitutionality. I return to these issues in Part II of the thesis.

¹⁸ A parallel between the two that is maintained, however, is that assent to agreements requiring it, and to all treaties, must be obtained from both Chambers of Parliament when the federal order is a party: s.7, *Constitution*.

¹⁹ *Infra*, Chapter 4.

²⁰ Several persons interviewed noted the increased trend towards "executive democracy" in Belgium in which an increasing number of issues are relegated to regulations rather than legislation. On this phenomenon, more generally: QUERTAINMONT, Philippe, "Le déclin de l'État de droit", (1984) *JT* 273-280, 276-277; MOCKLE, Daniel, "Gouverner sans le droit: mutation des normes et nouveaux modes de régulation", (2002) 43 *C de D* 141-210, 208.

²¹ *Circulaire relative à l'entrée en vigueur et au suivi des accords de coopération* of 27.10.1999, preamble.

²² For an exception: AC portant création d'un Comité consultatif de bioéthique (FED + 3C), 15.01.93 (15.06.95).

²³ JANS and TOMBEUR (2000) 149.

²⁴ MOERENHOUT (2001) 618.

²⁵ *Infra*, Chapter 5.

- **Political protocols**

Prior to the introduction of formal cooperation agreements, “pre-federal” partners concluded protocols, which were generally considered not to be legally binding. In recent years, federal partners have increasingly resorted to agreements between executives that do not follow the official route of cooperation agreements: they are not officially described as cooperation agreements and do not refer to s.92*bis* in their preamble.²⁶ This is likely in order to circumvent the formalism associated with the conclusion of cooperation agreements, as well as the various forms of parliamentary and/or judicial control to which the latter are subject. Some are adopted by the Concertation Committee or Ministerial Conferences, and do not seem to be submitted to the entire cabinets of each order of government. Some are published (notably the protocols) but by no means all of them.²⁷ Occasionally, an addendum to a cooperation agreement is called “protocol”. If the main agreement requires legislative assent, so would this supplementary agreement, regardless of its official designation.²⁸

Some “gentlemen’s agreements” are even more opaque. A striking example lies in a consensual agreement of a multilateral working group on “mixed treaties” (that is, treaties which affect the competences of several orders of government) and approved by the Interministerial conference of External Affairs.²⁹ By derogation to the Constitution and a formal cooperation agreement on “mixed treaties”, it provides that when a treaty only touches upon the competences of an order of government in a “marginal” way, it is to be considered to fall within the exclusive jurisdiction of the order of governments primarily affected.³⁰ Unsurprisingly, this agreement was not published.³¹ It has been applied, however.³²

Chapter 4 examines the status of these protocols and suggests that their official designation does not necessarily shield them from the characterisation as legal instruments.

²⁶ Protocole financier à l’accord de coopération du 05.04.95 relatif à la politique internationale de l’environnement (FED + 3R), 28.04.00, (16.10.03).

²⁷ Protocole relatif à la politique de santé à l’endroit des personnes âgées (FED + 3C + COCOF), 09.06.97 (30.07.97).

²⁸ Décret portant assentiment au protocole financier du 04.10.2002 à l’accord de coopération du 05.04.1995 relatif à la politique internationale de l’environnement. (FED + 3R) (M.B. 16.10.03).

²⁹ Minutes of Working Group on Mixed Treaties, 17.06.1998, Minutes of Interministerial Conference on External Affairs of 24.06.1998 (Confidential, on file with author).

³⁰ The rule of thumb that “marginal” means about 10% was only uttered orally.

³¹ It is highly probable that the parties concluded such an opaque instrument because they were aware of the legal fragility of the rule. It is consequently unlikely that they could have intended to create legal relations through that instrument.

³² At least one treaty has been adopted pursuant to this derogatory procedure: an international cooperation agreement on astrophysics and a number of addenda, despite the opinion of the Council of State that it was a mixed treaty: Décret d’assentiment CF: (MB 27.11.1999). The ratification required another protocol between the Flemish and French scientific research foundations in Belgium: email from Flemish Treaty service (01.09.2003).

2.2.3.2 Typology based on legal criteria in Canada

Unlike in Belgium, the typology in Canada does not flow from a - non-existent - legislative framework. The typology that follows is thus largely dependent on the legal status of the IGAs in question, which is not predetermined, but requires a significant degree of “inductive” analysis which is the object of Part II of the thesis. What follows is thus a cursory exploration of categories which stem essentially from the case law analysed in Part II and from rules of government contracts which apply to IGAs.

- **“Constitutionalised” IGAs**

The associative and dissociative origins of the Canadian federal regime were noted earlier. The process of association led to the conclusion of agreements between the existing State and the other British colonies meant to join it, or with provinces “carved out” of existing larger federal territory.³³ The first ones are referred to as “Terms of Entry” and the second as “Natural Resource Transfer Agreements” (NRTA).³⁴ All were endorsed by the Westminster Parliament,³⁵ and are now scheduled to the *Constitution Act 1982*. They are therefore constitutionally entrenched.

- **IGAs and parliamentary endorsement**

The vast majority of IGAs concluded nowadays in Canada are considered to be “administrative agreements”. Their conclusion is occasionally contemplated by a particular statute, but this is not always the case. Most are never introduced in one form or another before legislative assemblies. Unlike the situation in Belgium, there is no specific requirement that agreements of a particular type receive some form of parliamentary approval, although their legal status *erga omnes* requires a particular type of parliamentary endorsement.³⁶

³³ MORIN, Jacques-Yvan et WOEHLING, José, *Les constitutions du Canada et du Québec : du Régime français à nos jours*, 2 volumes, (Montréal: Thémis, 1994 and TREMBLAY, André, *Droit constitutionnel canadien et québécois*, Documents (Montréal: Thémis, 1999).

³⁴ The 1897 and 1871 *Constitution Acts* gave the Dominion the power to determine the conditions of Entry of provinces created on what was then Rupert’s Land and the North West Territories, to be approved by a British Order in Council. The 1905 *Saskatchewan and Alberta Acts* reserved the natural resources of those provinces to the federal government: *Re Transfer of the Natural Resources to the Province of Saskatchewan*, [1931] SCR 262. This anomaly (other provinces having control over their natural resources) was corrected by the NRTAs of 1930; *Alberta v. West Canadian Collieries Ltd.*, [1953] AC 453 (PC).

³⁵ S. 146, *Constitution Act*, 1867 provided that British order-in-council would have power of statute in this context. The process was slightly different in the case of Newfoundland: *Re Bowater’s Newfoundland Pulp and Paper Mills Ltd.*, [1950] S.C.R. 608, 649 and 659; *Hogan v. A.G. Newfoundland*, (2000) 183 DLR 4th 225 (NFCA).

- **Political protocols**

As was mentioned earlier, IGAs in Canada come under a wide variety of designations. Unlike the situation in Belgium, the designation does not, *a priori*, bear on their legal characterisation.

2.2 The conclusion, modification and termination of IGAs

2.2.1 The conclusion of cooperative agreements in Belgium

2.2.1.1 Parties, signature and coming into force

Despite the silence of article 92*bis* of the 1980 DMA on the subject, agreements are always concluded by the respective executives.³⁷ They may be negotiated by civil servants, members of ministerial cabinets or a combination of both. Ministers responsible for a particular policy area may be directly involved in the case of particularly sensitive agreements. In any event, Ministers are always directly involved in the final stages and they are always the official signatories, sometimes in conjunction with a Deputy-Prime Minister (for federal authorities) or a Minister-President (in the case of a federated entity).

An agreement does not enter into force without the formal endorsement of the complete Executive (cabinet), although there is no clear legislative provision to that effect. Logically, one would expect that this endorsement would be given prior to the official signature by the Ministers. For practical reasons, it appears that most agreements are signed before receiving the formal imprimatur of the respective Executives.³⁸ Occasionally, several signed versions circulate simultaneously between civil servants and ministerial cabinets, prior to receiving the formal and final endorsement of the Executive.

³⁶ *Infra*, Chapter 4.

³⁷ In fact, s.92*bis* only specifies that agreements are concluded by Regions, Communities and the State (sometimes designated as “national” or “federal authority”). Thus, the DMA does not explicitly exclude the possibility that agreements could be concluded by legislative assemblies, although this has never occurred. By contrast, the prerogative of concluding international treaties is expressly reserved to the Executives. COENRATS argues that the conclusion of agreements by assemblies would affect the democratic process. The basis of his objection is unclear. COENRAETS, Philippe, “Les accords de coopération dans la Belgique fédérale”, (1992) 16 *Adm publ* 158-202, 188, fn 235.

³⁸ One must assume that a Minister will have the informal consent of his or her colleagues before signing an agreement, although no strict rule governs that process. In some cases, it can be presented as a *fait accompli* to the members of an Executive which are from a different political party than the Minister in question (the proportional electoral system always leads to coalition governments).

According to the Concertation Committee Secretariat (CCS), the formal date of the agreement must be the date at which the last formal governmental endorsement is given, and not the date at which the agreement is actually signed.³⁹

2.2.1.2 Formalities and drafting style

Parliamentary assent of agreements of a legislative nature follows regular legislative procedures. In the case of agreements of an administrative nature, however, the required formalities are less obvious. By analogy with private contracts, COENRAETS posits that a simple exchange of will by the parties is sufficient to create a binding agreement, and thus that cooperative agreements could theoretically be concluded orally.⁴⁰ Be that as it may, this seems highly unlikely, and in practice, Belgian cooperative agreements are always written, and generally follow a very precise and strict format. Their preamble always refers to s.92*bis*, thus confirming the nature of the agreement as a formal cooperation agreement, as opposed to a protocol, for instance.⁴¹

2.2.1.3 Official Languages

The complex arsenal of linguistic legislation in Belgium does not deal specifically with the language of IGAs. Rules of general application should therefore be of application. In brief, this means that:

- A bilateral agreement between the federal government and a federated entity will be in the language(s) of the latter: French for the French Community and Wallonia, German for the German-speaking Community, Dutch for the Flemish Community/Region and French and Dutch in the case of the Brussels-Region;
- An agreement between Communities or between Regions will be drafted in the language(s) of the parties;
- An agreement to which the Walloon Region is a party should always have a German version, since the German-speaking Community is located within the Walloon Region;

When an agreement is published in the *Moniteur belge* (the Official Gazette) there will always be a French and a Dutch version.⁴²

³⁹ S.II(1), *Circulaire relative à l'entrée en vigueur et au suivi des accords de coopération* du 27.10.1999, unpublished.

⁴⁰ COENRAETS (1992) 164.

⁴¹ *Principes légistiques en matière d'accords de coopération*, 27.10.1999, unpublished.

⁴² The *Moniteur belge* publishes official documents of the federal authorities, as well as those of the federated entities: www.moniteur.be. Rules governing the language of publication of legislative and regulatory norms are applied by analogy to cooperative agreements: s.4, *Loi du 31 mai 1961 relative à l'emploi des langues en matière législative, à la présentation, à la publication et à l'entrée en vigueur des textes légaux et réglementaires* (MB 21.06.1961).

2.2.1.4 The role of legislative assemblies

An agreement of a “legislative” nature will obviously require legislative assent, pursuant to the rules applicable to the relevant assemblies. The assent takes the form of a legislative instrument, although the exact status of this instrument (a real statute with statutory force or not) is a matter of controversy. That issue relates to the debate surrounding the place that cooperative agreements occupy in the hierarchy of norms.

Parties to an agreement may not, through a framework legislative agreement, exempt subsequent implementation agreements from specific legislative approval, if the latter also burden public authorities or individuals.⁴³ In other words, there cannot be legislative approval by anticipation: an agreement can only be approved once its precise content is known.

Since agreements are negotiated and drafted by representatives of the respective Executives, the latter have the prerogative of determining if a particular agreement requires legislative assent. If the Executives are of the opinion that no legislative approval is required, no proposed legislative norm of approbation will - by definition - be submitted to the legislative section of the Council of State for an advisory opinion on the issue.

When an agreement is submitted to a legislative assembly, the latter’s input is limited: it may accept or refuse its assent, but it cannot amend the agreement.⁴⁴ By refusing, it would send the parties back to the negotiating table. This has not yet occurred in Belgium. In this sense, despite the formal role played by legislative assemblies, cooperative agreements clearly remain instruments of executive federalism. Parliamentarians have deplored their essentially rubber-stamping role.⁴⁵

2.2.1.5 Publication

Legislative instruments approving agreements of a legislative nature will be published in the *Moniteur belge* but there is no obligation to publish the agreements themselves. In practice, however, the agreement is scheduled to the instrument giving assent to it. This can give rise to repeated publication of the same agreement. Despite the lack of legal obligation,

⁴³ CSLS 24.479, Doc CRW, 1995/96, 162. Note that this rule is different from the rules relative to international treaties, which may receive “anticipatory” legislative approval: CONSEIL D’ÉTAT, *Rapport public pour l’année judiciaire 1995-1996* (1999) 12 *Chron. Droit public* 1-2.

⁴⁴ LAGASSE (1999) 350.

⁴⁵ For ex: Conseil de la Région de Bruxelles-Capitale, *Compte-rendu intégral* (08.05.1998) 776-778. In late December 2002, the Walloon government even had an agreement published in the *M.B.* before submitting it to its legislative assembly (agreement on International Trade Agency).

a significant number of cooperative agreements of an “administrative” nature are also published.

In theory, all agreements which impose obligations on citizens should receive legislative assent, which is necessarily followed by publication. This is not always the case, however. Publication is even more haphazard in the case of “protocols” and other types of agreements between executives. While cooperative agreements are not specifically mentioned in article 190 of the Constitution, pursuant to which all legislative or regulatory instruments must be published, MORENHOUT and SMETS argue that it would be consistent with the spirit of that article that the obligation extend to agreements, particularly to agreements which create rights for third parties.⁴⁶ This seems logical. From a perspective of transparency and for simplicity's sake, it seems desirable that all agreements be published, irrespective of their direct impact on third parties, should be published. This would allow for a greater political and public control over acts of the executive, and reflect a concern with transparency in public management.

It bears mentioning that agreements that are not published in the *Moniteur belge* are not accessible to the public. In the absence of clear legislative rules, access to those agreements is a matter of political discretion on the part of the Executive.

2.2.2 The conclusion of IGAs in Canada

2.2.2.1 Parties, signature and coming into force

As a general rule, agreements are negotiated by the civil servants responsible for a particular policy area. Only agreements with a strong symbolic value, which involve significant sums of money, or are politically sensitive, will also involve central agencies.⁴⁷

The level of signatories varies greatly, depending on the strategic significance of the agreement. Some are signed by the Prime Minister and Premiers, others by Ministers responsible for the sector at issue, others by senior civil servants. Some agreements are not actually signed, and in a surprisingly number of cases, the original signed copy cannot be located.⁴⁸

⁴⁶ MORENHOUT and SMETS, (1994) 163-164.

⁴⁷ Hence, while the formal agreement was concluded between the Quebec Department of Education and the Millennium Foundation, a new Agency fully financed by the federal government, the agreement is accompanied by a very extensive exchange of letters between Ministers: Administrative Agreement on the Millennium Scholarships between the Canadian Foundation for Millennium Scholarships and the government of Quebec (21.12.1999) SAIC 2000-001 and the 19 letters annexed.

⁴⁸ Puzzled, a Federal Court judge described a written but unsigned agreement between the Ontario and federal governments as an “oral” or “draft” agreement: *Commissioner of Official Languages v.*

Some provincial statutes condition the validity of IGAs to the signature of the Minister responsible for Intergovernmental Affairs (possibly in addition to the Minister responsible for the policy sector, or even the Premier).⁴⁹ In some cases, an IGA must also be approved by the entire Cabinet. No equivalent statutory restrictions apply to federal authorities, although specific statutes can authorise a Minister to conclude an agreement, subject to cabinet approval.

2.2.2.2 Formalities and drafting style

There are no guidelines on the drafting of IGAs. They range from informal joint declarations, resembling press releases,⁵⁰ to complex agreements with hundreds of articles and resembling international treaties.⁵¹ The degree of formality and the wording chosen may impact on the binding character of an agreement. Otherwise, the absence of standards concerning drafting techniques reflects – once more - the haphazard and pragmatic practice of IGAs.

2.2.2.3 Official Languages

The lack of legislative or constitutional framework makes it difficult to set out the rules governing the language in which agreements are drafted with precision. Pursuant to the *Federal Official Languages Act* (OLA): “[a]ny instrument made in the execution of a legislative power [or] with the approval of the Governor in Council or one or more ministers of the Crown [...] shall be made in both official languages [...]”.⁵² This would appear to cover a large number of IGAs. Yet, this has never been the practice.⁵³ Often, for political rather than legal reasons, the federal government would not make an agreement public (by putting it on a website, for instance), unless it is available in both languages. When an agreement is not published, the public may seek access by virtue of the *Access to Information Act*. The claimant can then request that the IGA be translated by federal authorities, who have a

Canada (*Department of Justice*), FCTD, T-2170-98, 23.03.2001, par. 68 and 193 [the “*Contravention case*”].

⁴⁹ This is the case of Québec: *An Act Respecting the Ministère du Conseil Exécutif*, SQ, ch. M-30S, ss.3.8-3.9); Alberta: *Government Organization Act*, RSA 2000, ch. G-10, Schedule 6; and Newfoundland: *Intergovernmental Affairs Act*, RSNL 1990, ch. I-13, s. 7; Even in the absence of such statutory obligation, it is the “policy” of some provinces to have the Department of Intergovernmental Affairs oversee all agreements: email exchange with B.C. authorities (03.08.03).

⁵⁰ National Child Benefit: involving \$ 350 million of federal investments was never framed in a written and signed agreement: POIRIER, Johanne “Federalism, Social Policy and Competing Visions of the Canadian Social Union”, (2002) 13 *NJCL* 355-435, 405-409.

⁵¹ Internal Trade Agreement, 01.07.1994 (CA01093).

⁵² *Official Languages Act*, RSC, ch. 31 (4th Suppl.).

⁵³ A 1985 internal circular seems to be the only text governing the language of IGAs: GOVERNMENT OF CANADA, Treasury Board, Circular 1985-33 on *Official Languages*.

certain discretionary power to accede to the demand. In practice, major IGAs, particularly multilateral ones, are always available in both languages.

Provinces may conclude agreements in their official language. Obviously, an agreement relative to a language minority (concerning the financing of minority language schools, for instance) will also be written in that language.

2.2.2.4 The role of legislative assemblies

Even when they have authorised their conclusion, legislative assemblies are not systematically informed of the negotiations and signature of IGAs,⁵⁴ although Commissions overseeing expenditures will receive a list of agreements which involve public expenses. This, of course, is quite different from the situation in Belgium, where agreements of a “legislative nature” must be approved by the various parliaments.

A recent in Quebec statute requires that all major international agreements touching upon provincial powers be approved by the Quebec National Assembly.⁵⁵ This initiative does not extend to IGAs concluded with other orders of government in Canada. Of course, a government may seek a parliamentary approval or the ratification of a particular IGA even when it is not formally required to do so.⁵⁶ However, governments rarely opt for such parliamentary scrutiny if they can avoid it, especially when the issue is by definition political, as are all intergovernmental relations.

Even when they are called upon to approve or ratify an agreement, legislative assemblies are essentially reduced to rubber-stamping a text negotiated by their respective executives. They cannot modify the result of fragile and/or complex intergovernmental political bargaining. The situation is thus essentially the same as the one which is denounced in Belgium.

2.2.2.5 Publication

As a general rule, there is no obligation to publish IGAs in Canada. An agreement that is implemented through a legislative instrument may be scheduled to it in official publications, but this is not always the case. Similarly, an order-in-council approving an IGA

⁵⁴ Exceptionally, certain Acts require that IGAs be transmitted to the assembly: *Council of Maritimes Premiers Act*, S.N.B., ch. 29, s.8.

⁵⁵ *An Act respecting the Ministère des Relations internationales and other legislative provisions*, R.S.Q. M-25.1.1, s.2.2.

⁵⁶ The federal government did so in January 2003 concerning the ratification of the Kyoto Protocol.

is published, but the IGA itself rarely is.⁵⁷ An unpublished IGA is subject to Access to information legislation. Access may, however, be restricted if it threatens intergovernmental relations.⁵⁸ Given the importance of agreements in the conduct of public administration, subjecting public access to this type of procedure raises concerns of democratic accountability. Neither the federal nor the Québec registry are directly accessible to the public. This being said, it is obvious that the internet phenomenon has had an impact here as well and a number of IGAs are now found on Departmental websites. This is far from systematic, however. Recently, the Québec government has started to list the IGAs to which the province is party, but not the agreements themselves.⁵⁹

2.3 The modification and termination of IGAs

2.3.1 The modification and termination of IGAs in Belgium

Agreements often stipulate modalities of termination. Some are for a fixed duration, frequently with a possibility of a tacit renewal. The majority, however, have no specified duration. They generally provide that their content can be modified or terminated by mutual consent, failing which they can be denounced by one party at the end of a specified formal notice period. Some observers have argued that rules of termination applicable to the law of contracts or international treaties should apply by analogy to cooperation agreements.⁶⁰ This would include rules such as impossibility to execute in civil law (or frustration in the common law), the exception of non-performance, etc.

It is conceivable that a multilateral agreement could be modified only with regards to one party. In that case, the modification would constitute a codicil or protocol to the original agreement. In fact, all parties may decide to conclude agreements that modify aspects of an earlier one, rather than abrogating the original one and adopting a complete modified version.⁶¹ If the original agreement required legislative approval, modifications to this agreement should also be submitted to legislative assemblies.⁶²

⁵⁷ S.11.1, *Executive Power Act*, RSQ, ch. E-18.

⁵⁸ S.14, *Access to Information Act*, R.S.C. 1985, ch. A-1 (federal); s. 19 *Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, RSQ, ch.A-2.1 (Québec). For decision to withhold for such a reason in Nova Scotia: *Report in the Matter of the Freedom of Information and Protection of Privacy Act* (03.04.1998), no FI-98-20: www.canlii.org/ns/cas/nsfoipop/1998/html.

⁵⁹ www.mce.gouv.qc.ca/e/publications/ententes_inter.pdf.

⁶⁰ KLEIN (1990) 12.

⁶¹ See multiple "Avenants" to the 1993 federal-RBC agreement on the promotion of Brussels as a capital and international city.

⁶² MOERENHOUT and SMETS (1994) 169, fn 826.

Interestingly, none of the authors analyses in any detail the possibility of unilateral denunciation by the legislative assembly, which, as we shall see, is fundamental in the Canadian context. They generally simply assert that co-operative agreements are consensual and thus cannot be revoked unilaterally, including by a legislature.⁶³

2.3.2 The modification and termination of IGAs in Canada

As is the case with Belgian cooperation agreements, some IGAs contain clauses relative to their termination. Some are for a fixed period, frequently with a possibility of a tacit renewal. A number, however, have no specified duration. Whether this implies that they can be denounced at any time obviously depends on their legal status. Generally, they can be modified or terminated by mutual consent. Unilateral termination is possible after a specified formal notice period.

As Part II of this thesis will show, even when they are legally binding, all IGAs except for those with constitutional value are susceptible to unilateral repudiation by legislative assemblies. In other words, what is apparently inconceivable in Belgium, is undeniable in Canada.

Conclusions

IGAs are concluded in vast numbers in both Belgium and in Canada. The practice is relatively similar, although the degree of formalism is apparently greater in Belgium. The caveat flows from the lack of formal text relating to IGAs, which both reflects and explains the lack of consistency in format, drafting techniques, official designation. One major difference reflects the constitutional history of each federation. Canadian “constitutionalised” agreements and Belgian “compulsory” agreements were both essential to the federalisation process. The historical context in which the former were concluded has not lead to the elaboration of a legislative framework concerning IGAs, of whatever type. By contrast, the insertion of “compulsory agreements” in the Belgian legal order in 1988-89 brought in its wake a detailed legislative scheme, including specific provisions for parliamentary involvement. It is plausible that the existence of this framework has contributed to the conception of IGAs as legal instruments, and to a contrary conception in the Canadian context. This will be assessed in Part II of the thesis.

Before turning to the status of IGAs, however, the following chapter surveys the range of functions performed by IGAs in the two federal regimes.

⁶³ This is explored in Chapter 6.

CHAPTER 3: THE FUNCTIONS OF IGAs

Introduction

In the introduction to the thesis, I explained that its topic was kindled by an initial observation and a “hunch”. On the one hand, intergovernmental agreements seemed to play similar roles in a variety of federal regimes. On the other hand, they appeared to enjoy a distinct legal status in different federations. Apparently, law played a surprisingly different role in the management of the similar mechanisms of intergovernmental relations. I found this paradox puzzling. The present chapter deals with the first branch of the original intuition. It explores the various roles – the “functions” – which IGAs play in federal regimes.

In my view, the functions played by intergovernmental agreements fall into two main - although not mutually exclusive - categories. “Explicit functions” include substantive policy co-ordination or harmonisation, as well as procedural and organic co-operation (the creation of joint organisations).¹ Agreements falling in this category apparently fulfil the objectives explicitly identified by the signatories (3.1). The second category includes “latent” or “implicit” functions, mostly para-constitutional and symbolic ones. Through this category, the following analysis seeks to go beyond the description of the overt purpose of agreements, to investigate some of their less obvious and transparent roles (3.2). Of course, agreements which play implicit functions will always have an explicit one as well: their latent role hides behind their official *raison d’être*.² The following illustrates the range of roles played by IGAs in federal regimes with a limited number of examples, where, often, hundreds could be provided.³

3.1 The explicit functions of IGAs

3.1.1 Substantive cooperation

As we have seen, intergovernmental agreements are central to most areas of public activity in Belgium and in Canada, as in most other federal regimes. IGAs are numerous in

¹ This distinction parallels the one discussed by GARCIA VILLEGAS, but is used in a different way. I am not concerned with the effectiveness of law *per se*, but on the purpose, stated or otherwise, of particular instruments: GARCIA VILLEGAS, Mauricio, “Efficacité symbolique et pouvoir du droit”, (1995) 36 *Rev. interdisciplinaire d’études juridiques* 155-178, 158-159. I first developed this distinction in POIRIER, *Concordats*.

² I use the term “function” to signify the role or the purpose played by IGAs. By contrast, FLORESTANO (1994) uses the expressions “functions” and “subject matters” interchangeably. The functions identified by GARCIA MORALES (1998) 54-68 fall exclusively in the “explicit” category.

³ The examples are drawn from Belgian and Canadian IGAs listed in Appendices B and C. References are more complete in those Appendices.

the field of environmental protection, health care delivery, family policy, agriculture, employment measures, the co-ordination of fiscal policy, the management of inter-regional infrastructures which extend over the territory of one federated entity. IGAs are used to rationalise the exercise of their respective competences in order to minimise duplication and over-lapping or to finance or co-finance projects of common interest. Federal partners principally resort to IGAs in order to coordinate their respective actions in fields of exclusive competences, or to sort out their respective interventions in cases of shared or concurrent competences. IGAs thus delineate the parameters of action of each order of government. The following pages review some of the “material” or practical uses of IGAs in federal governance. The main questions which IGAs address in this context are “who does what?” or “who pays for what?”

3.1.1.1 The articulation of exclusive competences

IGAs often serve to articulate the exercise of exclusive - but closely connected – competences in order to co-ordinate policy initiatives. This is necessary when a policy area does not follow constitutional fault-lines.

For instance, in Canada, the federal government has constitutional jurisdiction over unemployment insurance, whereas professional training is a provincial matter. Legislative authority in terms of active labour measures is unclear and controversial. In the post-war period, the federal government financed and managed training programs for the unemployed.⁴ Provinces, and principally Québec, have claimed a greater role (with corresponding financial means) to intervene in the area of active labour measures. The responsibility over this aspect of unemployment policy has now largely been conferred to provinces through a series of agreements which articulates the respective roles and responsibilities.⁵

The need for substantive coordination is possibly even more acute in Belgium, where the process of federalisation followed the development of a sophisticated welfare state. Continuity of service requires a certain degree of co-ordination between entities endowed with new legislative and administrative powers. As in the Canadian case, a number of IGAs have been concluded to seek to articulate distinct competences in the employment sector, given that unemployment insurance has remained federal, labour training is a Community

⁴ Often by “purchasing” places for the unemployed in regular schooling and professional training programs, developed under the jurisdiction of the provinces.

⁵ For example: Canada-Alberta Agreement on Labour Market Development, 06.12.1996 (AB01525). All those IGAs are reproduced on: www.hrdc-drhc.gc.ca.

matter, while the placement of unemployed persons has been “regionalised”.⁶ A number of agreements deal with the articulation of these obviously interconnected, albeit exclusive, powers.⁷

Another example is provided in the field of justice and social services. It will be recalled that the federal government has exclusive competence over criminal law and the police, while the Communities have the constitutional responsibility for social assistance and mental health.⁸ In the aftermath of a major paedophilia scandal, a parliamentary Commission deplored the fragmentation of competences and the lack of coordination between orders of government.⁹ A number of agreements have since been concluded with the avowed purpose of avoiding duplication and limiting gaps in intervention of public authorities. Some articulate the respective roles of the police and social assistants in their dealings with victims of crime.¹⁰ Others concern the monitoring and guidance of sexual offenders.¹¹

3.1.1.2 The disentanglement of shared competences

While agreements are useful tools for articulating the exercise of exclusive but closely connected competences, they can also serve to sort out responsibilities, in order to avoid duplication, in areas of concurrent or shared legislative competences. The fashionable term in Canada to designate this process is to “disentangle” responsibilities.¹² Hence, a number of IGAs have been concluded in the area of environmental protection, notably to avoid duplication over environmental impact assessment.¹³ Some also aim at defining common standards, and then to “disentangle” which government will assume responsibility for implementing them.¹⁴

⁶ In fact, this distribution is even more complex, because the exercise of powers on a variety of issues, including labour training, has been transferred from the French Community to the WR and the COCOF. While this explains the multiplication of IGAs, this is not relevant for present purposes.

⁷ For ex.: AC concernant l’insertion des demandeurs d’emploi vers la convention de premier emploi (FED + 3C + 3R), 30.03.00 (09.12.00).

⁸ Again, in the French side of the country, part of that competence is exercised by the WR and the COCOF.

⁹ “Enquête parlementaire sur la manière dont l’enquête, sans ses volets policiers et judiciaires, a été menée dans “l’affaire Dutroux-Nihoul et consorts”, Doc Parl, Ch, SO 1996-1997, 713.

¹⁰ AC en matière d’assistance aux victimes (FED + FI C), 07.04.98 (13.07.99).

¹¹ AC concernant la guidance et le traitement d’auteurs d’infractions à caractère sexuel (FED + COCOM + COCOF), 13.04.99 (26.07.00, 15.11.00, 23.01.01). The constitutionality of this agreement was creatively confirmed by the Court of Arbitration: *infra*, 6.1.1.1.

¹² SIMMONS (2003) 15.

¹³ Canada-wide Standards Sub-Agreement : cited in SIMMONS (2003) 15.

¹⁴ Canada-British Columbia Agreement for Environmental Assessment Cooperation, 16.04.1997 (BC 01670).

¹⁵ Canada-wide Standards Sub-Agreement; HARRISON, Kathryn, “Federal-Provincial Relations and the Environment: Unilateralism, Collaboration, Rationalization” in Van NIJNATTEN, Debora L., BOARDMAN, Robert (eds.) *Canadian Environmental Policy: Context and Cases*, 2nd ed., (Toronto: OUP, 2002) 123-144.

Given the official principle of exclusivity of legislative powers between the Belgian orders of government, there are technically very few concurrent powers. This being said, the degree of detail in the actual distribution of powers - with long lists of exceptions in favour of the federal government even in fields which have been transferred to Communities or Regions, for instance – is such that in practice many policy areas are governed by an intricate web of interlocking competences. This is the case of health care, for instance. In principle, all preventive care as well as the fundamental competence over public health have been “communitarised”. However, health care insurance – which occupies around 98% of the total health care budget – has remained under federal jurisdiction. The current distribution of powers in this area is mind-boggling. A Senatorial Commission reviewed the distribution of powers in the field of health care and deplored the numerous areas of overlapping and uncertainty as to constitutional competences.¹⁵ Its only suggestion to clarify the situation was that cooperation agreements – including compulsory ones – be negotiated to limit duplication.¹⁶

3.1.1.3 Joint programmes and co-financing

In larger federations, agreements are regularly concluded to address matters of interest to several federated entities, such as the co-financing of programmes or infrastructures. Some are purely horizontal, others are vertical but concluded with only a limited number of federated entities. Hence, IGAs serve to pool resources or develop joint programmes. For instance, the relatively small Atlantic provinces collaborate on matters of education and tourism.¹⁷

Given the strong “dissociative” trend of Belgium federalism, the co-management of programmes is not common, particularly across the linguistic border. There are examples of inter-regional agreements, however, concerning the maintenance of inter-regional roads,¹⁸ the co-financing of research institutes which fall within the competences of both federal and Community authorities¹⁹ as well as the running of a closed-centre for young offenders.²⁰

Co-financing or co-management raises no constitutional difficulty when the project or joint organ involves competences falling within the sphere of each participating entity. The situation is much more complex when an IGA serves as an instrument of the spending power

¹⁵ Commission des affaires institutionnelles du Sénat, *Évaluation du fonctionnement des nouvelles structures fédérales*, Rapport 30.03.1999, 1-1331/1, sections 3.1.1.2 ff., and Annexes 11 and 12.

¹⁶ This is an area in which a number of “protocols” have been concluded: *supra*, 2.2.3.1.

¹⁷ Atlantic Canada Agreement on Tourism, 01.04.1997 (CA 01634).

¹⁸ AC concernant les routes dépassant les limites d'une Région (3R), 17.06.91 (09.01.92).

¹⁹ AC sur le financement, le fonctionnement et la gestion de l'Institut d'hygiène et d'épidémiologie (Pasteur) (FED + 3C + 3R), 22.03.90, 18.05.95, 30.03.01 (19.05.90, 06.09.95).

through which one order of government funds activities over which it does not have legislative competence. This is extremely frequent in Canada, and is gradually finding its way in Belgium, despite strong judicial pronouncements against this practice. Examples are examined below, in the section on the implicit “regulating by contract” function of IGAs.

3.1.1.4 The purchase of services and extension of benefits to citizens of another order

In Canada, the federal government has concluded IGAs with several provinces pursuant to which the latter are responsible for issuing contravention notices and for prosecuting violations of certain federal statutes. In exchange, provinces are entitled to keep half the proceeds of the fines collected.²¹ The actual arrangements are a mixture of federal and provincial statutes, as well as IGAs setting out modalities of payment. Some provinces have also agreed to perceive the V.A.T. on their territory on behalf of federal authorities.²²

Agreements also provide for the purchase of services on behalf of one’s population from another order of government. Hence, Quebec and New Brunswick have concluded an agreement through which the former guarantees a number of places in medical and agricultural faculties to students of the latter. In exchange, the latter undertakes to reimburse 75% of the average cost per student.²³ Likewise, the federal government regularly “purchase” social services from provinces, for population over which it has constitutional responsibility, such as war veterans or aboriginals.²⁴

Similarly, in Belgium, a cooperation agreement was concluded to allow the placement of young offenders from the German-speaking Community to be placed in institutions of the French Community. Given its given its limited size, the German-speaking Community does not have its own institutions. Provisions are made for cost-recovery.²⁵

A number of agreements serve to circumvent the rigidity of the territorial divisions inherent to federal regimes.

²⁰ AC relatif au centre fermé pour le placement provisoire de mineurs ayant commis un fait qualifié d’infraction (FED + 3C), 30.04.02.

²¹ Accord relatif à la loi sur les contraventions, 31.03.2001 (FED + QC) (SAIC 2000-036).

²² Agreement concerning the perception of the Goods and Services Tax, 26.04.1991 (FED + QC) (SAIC 1991-15 and 1997-038).

²³ While it is not specified, the intention is clearly to offer educational opportunities to Acadians: Protocole d’entente concernant un programme d’échanges et de coopération dans le domaine de l’enseignement supérieur, 31.05.1991 (QC-NB).

²⁴ Agreement Regarding Delivery of Health Care and Treatment Services to Veterans, 08.06.1990 (BC00545); Tuberculosis Memorandum of Agreement, 01.04.1997 (BC 01622).

3.1.1.5 Setting or circumventing territorial boundaries

In some federations, IGAs have been used to settle border disputes between federated entities.²⁶ In Canada, borders between provinces require constitutional amendment.²⁷ In the early days of the Canadian federation, however, some “provisional boundary agreements” were negotiated until a clarification was obtained through arbitration.²⁸ British Columbia and Ottawa also identified “public harbours” around Vancouver in an agreement embodied in two parallel orders-in-council.²⁹ Public harbours are a federal matter. The agreement thus had the effect of transferring legislative jurisdiction from the province to the federal order.

Given the complex and fragile compromises between linguistic and cultural groups that have given rise to the federalisation process, borders are particularly unassailable, even if they can technically be modified by a DMA.³⁰ This being said, in 1993, the Brabant province was split into two (the Walloon and the Flemish Brabant!). The scission was conditioned on the adoption of a “compulsory” agreement to resolve issues relating to the transfer of staff and property.³¹ That agreement did not set the new border but facilitated its implementation.³²

While IGAs are rarely used to actually modify borders between federated entities, they frequently serve to lessen the impact of these borders, regarding particular policy issues. Hence, IGAs are commonly used to lower existing restrictions on mobility or trade barriers.

Hence, in 1994, all Canadian provinces as well as the federal government signed an Internal Trade Agreement (ITA) – based on international models - in order to increase mobility and lower intra-federal barriers in the commercial or economic sector.³³ Adjacent

²⁵ AC relatif au centre fermé pour le placement provisoire de mineurs ayant commis un fait qualifié d'infraction (FED + 3C), 30.04.02.

²⁶ USA: FLORESTANO (1994) 16; Germany: s. 29.7 *Fundamental Law* (when less than 50,000 persons affected); GARCIA MORALES (1998) 69, fn 66; s. 53(4) Swiss Constitution of 1999.

²⁷ S. 43a, *Constitution Act 1982*.

²⁸ *Canada v. Ontario*, [1910] A.C. 637 (PC), aff. (1908), 42 SCR 1.

²⁹ *A.G. Canada v. Higbie*, [1945] SCR 385. Technically, the case turns on whether the agreement had to be ratified by legislation, or whether their approval through regulatory instruments was sufficient.

³⁰ S.4, *Constitution*.

³¹ S. 92bis(4quater).

³² AC pour le transfert [...] du personnel et des biens, droits et obligations de la province de Brabant [...] (FED + 3R + FL C + Fr C), 30.05.94, 28.10.94, 23.12.94, 16.03.95 (17.06.94, 02.12.94, 05.07.95, 20.05.95).

³³ Internal Trade Agreement, 01.07 1994 (CA01093): MAGNET, Joseph Eliot, “Federalism and its Discontents”, in BEAUDOIN, Gérald-A. and al., *Le fédéralisme de demain : réformes essentielles* (Montréal: Wilson Lafleur, 1998) 77-107, 84-86.

provinces have also concluded regional agreements to the same effect.³⁴ In theory, such an agreement is not necessary in Belgium where a monetary and economic union precludes trade barriers between regions.³⁵ A recent increase in the fiscal autonomy of Regions is however, conditioned on the adoption of an inter-regional agreement meant to limit the risk of “delocalisation” of businesses affected by particularly mobile taxes.³⁶ Such arrangements are particularly important in a country with such a small territory.

In a sense, extending services to the population of another entity through horizontal agreement implies exceptions to rules of territoriality. The fragile equilibrium and multiple trade-offs that ground the Belgium system, including the sensitive issue of “linguistic borders”, lead to a much greater concern over territorial jurisdiction than is the case in Canada. Competences are distributed on an exclusive basis, and their territorial application is restricted. Consequently, a French-speaking entity may not sponsor services in Flanders.³⁷ The solution is to assist certain French-speakers from that Region to travel to the French-side of the country to obtain services in their language. While commonsensical, such arrangements are politically extremely difficult to obtain, particularly between the North and the South of the country. An example is an agreement allowing handicapped persons to obtain services in another linguistic region.³⁸ An arrangement that also alters borders, but not necessarily so as to respond to linguistic needs of the population is the placement of young offenders from the German-speaking Community (which is too small to have sufficient services) in Wallonia.³⁹

3.1.2 Procedural co-operation

While a very large number of IGAs deal with substantive policy issues, others outline procedural mechanisms of co-operation. The purpose is to agree not on specific interventions but on the way in which competences are to be exercised. In other words, the question is not “Who does what? Who pays for what?” but rather, “How do we exercise our respective competencies? How do we share information, consult, communicate and resolve our disputes?”

³⁴ Agreement on Labour Mobility in the Construction Industry, 24.12.1993 (QC-ON).

³⁵ S.6(l)1(VI), 1980 DMA.

³⁶ S.92bis(2(f); relative to “car leasing” companies. Agreement not adopted as of 15.10.03.

³⁷ CA 54/1996, CA 30/2000; CA 56/2000.

³⁸ AC relatif à la prise en charge des frais de placement et d'intégration sociale et professionnelle des personnes handicapées (FI C + WR), 07.04.95; POIRIER, Johanne, “Intergovernmental aspects of policies towards persons with disabilities in Belgium”, in CAMERON, DAVID, VALENTINE, FRASER, *Disability and Federalism : Comparing Different Approaches to Full Participation* (Montréal/Kingston: McGill-Queen's Press, 2001) 97-149.

³⁹ Accord sectoriel en matière d'aide à la jeunesse (Fr C + GC), 27.04.01 (21.09.01).

Broadly framed agreements, which provide for the conclusion of subsequent detailed ones, often define processes for reaching subsequent agreements. So-called “framework” agreements generally contain few substantive undertakings. They mainly perform procedural functions: the Accord on Environmental Harmonization is a prime example of an IGA which sets out general principles of cooperation meant to guide governments in the elaboration of more precise arrangements.⁴⁰ In Belgium, separate framework agreements have been concluded between the GC on the one hand, and the FrC, the FIC and the WR on the other.⁴¹ While not identical, they all aim at encouraging exchange of information, consultation on matters of common interest. Some anticipate the subsequent conclusion of more specific agreements on a number of enumerated issues.

Of course, many agreements involve both substantive and procedural aspects. Hence, a number of IGAs aiming at policy coordination, include provisions on information-sharing, or set up management committees and dispute resolution mechanisms.⁴² To give one example amongst hundreds, the Canadian Internal Trade Agreement includes a section on dispute settlement.⁴³

As we saw in Chapter 1, in Belgium, double majority acts (DMA) already provide for a large number of compulsory cooperation mechanisms which take the form of consultation, concertation, association, joint-decision making and so on. In fact, agreements often result from these legislated rules of procedural cooperation, as opposed to being the source of them. This being said, a number of agreements also contain procedural cooperation clauses: they include clauses on information sharing, consultation processes or non-judicial dispute resolution mechanisms. For instance, the agreement on assistance to victims discussed earlier contains clauses pursuant to which Community social workers are to give feedback to the police officers who refer victims of crime to their services.⁴⁴

One of the most striking areas in which procedural agreements have been reached in Belgium is international relations and the implementation of European integration. Here, the depth of formal cooperation differs significantly between the two federal regimes. Federated entities are understandably concerned that international obligations may have a centralising effect, if federal authorities are the sole external interlocutors. Belgian constitutional law now grants federated entities the right to intervene directly in international or supra-national fora,

⁴⁰ Accord on Environmental Harmonization, 29.01.1998 (CA 01739).

⁴¹ AC global entre la RW et la CG + GC, 26.11.98 (21.08.99).

⁴² Hence, of the approximate 1300 IGAs contained in the PCO registry, 240 contain explicit “dispute resolution” clauses, the vast majority of which refer to management committees or other non-judicial organs.

⁴³ Internal Trade Agreement, ss.1600-1723.

⁴⁴ AC en matière d'assistance aux victimes (FED + FI C), 07.04.98 (13.07.99): *supra*, 3.1.1.2.

as well as treaty-making power.⁴⁵ The actual operation of such powers rests on a number of cooperation agreements, which aim to ensure a degree of coherence in Belgian foreign affairs.

For instance, an agreement governs the representation of Belgium in European institutions.⁴⁶ The agreement provides notably for a rotation system, pursuant to which Regions and Communities take turns speaking of behalf of Belgium, in areas falling within their sphere of competence.⁴⁷ It also outlines procedures in case consensus cannot be reached between federal partners concerning a common position. Another agreement governs procedures relative to “mixed treaties”, that is international agreements which affect competences which on the domestic front affect federal and federated competences.⁴⁸ It outlines the process for determining the nature of a treaty, as well as procedures for consultation, representation or registration of such treaties.⁴⁹

In addition to their potential role in the “ascending” phase, in which foreign policy is developed or international obligations contracted, IGAs can also be concluded in respect of the “descending” phase, that is, with respect to the implementation of international obligations in the domestic legal order.⁵⁰ In the exercise of their autonomous powers of implementation, orders of government in Belgium have also concluded agreements to harmonise the way in which they implement European directives in the domestic legal order.⁵¹

⁴⁵ S.167(3), *Constitution*.

⁴⁶ AC relatif à la représentation de la Belgique au sein du Conseil des Ministres de l'UE (FED + 3R + 3C), 08.03.94 (17.11.94) ; am. 13.02.03 (25.02.03). All these agreements have a parallel one with the COCOM, which is never published. This is not relevant for present purposes. The determination of who speaks for whom has been a contentious issue: MOERENHOUT (2001) 615.

⁴⁷ Paradoxically, in the wake of further “regionalisation” of agriculture through the 2001 round of constitutional reform which led to the abolition of the federal Department of Agriculture, the 1994 agreement was amended to remove the rotation system in that area, so that a federal Minister speaks of behalf of Regions at the European Council! : POIRIER, Johanne, “Les accords de coopération dans le processus de réformes institutionnelles: instruments d'exécution ou d'ingénierie constitutionnelle?” in CENTRE DE DROIT PUBLIC, *Les accords du Lambermont et du Lombart: Approfondissement du fédéralisme ou erreur d'aiguillage?* (Brussels: Bruylant, 2003) 78 and 93 [POIRIER, *Lambermont*].

⁴⁸ S.92bis(4bis)(2).

⁴⁹ AC relatif aux modalités de conclusion des traités mixtes (FED + 3C + 3R), 08.03.94 (17.12.96). As we saw (*supra*, 2.2.3.1) an informal – but applied – gentlemen's agreement discussed modifies this formal agreement (as it deviates from the Constitution) and provides that if an issue only affects one order of government marginally (assessed at 10%), it will not be considered a mixed treaty and is immune from the complex cooperative scheme.

⁵⁰ GARCIA MORALES, Maria Jesus, “La cooperacion en los federalismos europeos : significado de la experiencia comparada para el Estado autonomico” (2002) 1 *Revista de estudios autonomicos* 103-124, 110.

⁵¹ AC sur la prévention et la gestion des déchets d'emballages (3R), 30.05.96 (05.03.97); COENRAETS, Philippe, “La coopération dans la prévention de la gestion des déchets d'emballage”, (1998) *Aménagement-Environnement* 89-98. MOERENHOUT (2001) 617 estimates that the majority of agreements published in the MB between 1996 and 2000 were adopted in order to implement European law in matters of transportation, environment and agriculture. Cooperation agreements can also follow a ruling by the Luxembourg Court that Belgium has violated some European norm. See, for

In Canada, there is no parallelism between domestic and external competences in the ascending phase: only federal authorities may contract international obligations in the international legal order.⁵² However, such a parallel applies to the “descending” phase and powers of implementation in the domestic legal order follow the formal distribution of legislative competences.⁵³ In other words, in the international legal order, the federal government has the exclusive competence to conclude treaties on any subject. However, it cannot legislate to introduce treaties on education or social security into the Canadian legal order. In the case of shared competences, such as environmental protection, federal and provincial authorities can only implement the portion of a treaty over which it has legislative competence. To guarantee the willingness of provinces to execute a treaty which falls within their sphere of competences, federal authorities generally hold prior intergovernmental consultations.⁵⁴ These give rise to the occasional IGA, although the process is generally much less formal.

One such exception is an IGA concluded in the wake of the North American Free Trade Agreement and sub-agreement, such as the North American Agreement on Labour Cooperation (NAALC). While federal authorities could conclude those treaties, it could not implement them in the Canadian legal order, as labour law is principally a provincial matter. A procedural IGA was reached providing for exchange information concerning the NAALC, as well as for the preparation of answers raised by authorities responsible for the implementation of that international agreement.⁵⁵

3.1.3 Organic co-operation

The “organic” function is closely related to the two previous ones. Indeed, agreements can also serve to establish inter-jurisdictional bodies of varying degrees of formality, political significance or legal status and capacity. Their composition and mandates vary significantly. Some essentially offer secretarial support. Some are set-up to evaluate common or related policies. Others still co-manage specific projects or have a number of

example: AC relatif au respect des obligations de la Belgique envers les écoles européennes, et à leur financement (FED + 3C), 30.11.90 (20.02.91).

⁵² This is contested by Québec officials and a number of legal analysts, for ex. MORIN, Jacques-Yvan, “La personnalité internationale du Québec”, (1984) 1 *RQDI* 163.

⁵³ *Canada v. Ontario*, (1937) A.C. 326 (the *Labour Convention's case*).

⁵⁴ SCHAUS, Annemie, *L'exécution des obligations internationales dans l'État fédéral*, Doctoral thesis, vol. I (Université Libre de Bruxelles, 2001) 102-105.

⁵⁵ IGA Regarding the North-American Agreement on Labour Cooperation, 31.05.1995, impl. 01.01.1998, (CA01721).

delegated administrative functions. Some agreements establish multilateral committees with very significant influence in policy-making.⁵⁶

The number of consultative or management committees set up through IGAs is staggering. Of the 880 IGAs available on-line through the PCO registry, nearly 70% contained “management committee” clauses.⁵⁷ Some agreements give rise to a number of distinct organs. The Canadian Intergovernmental Agreement regarding the NAALC sets out five distinct committees. This multiplication of committees is common in Belgium as well. Hence, the 1993 Cooperative Agreement for the Promotion of Brussels as a Capital and International City, and its numerous codicils, has set out a remarkable web of federal-regional committees, of varying levels of formality, essentially to co-manage urban renovation projects.⁵⁸

The process of inter-delegation of regulatory and administrative responsibilities, has led to the creation of a number of boards and agencies with various degrees of normative authority.⁵⁹ Sometimes the agency is set up by statute by one order of government, and other orders delegate powers to it, again by statute.⁶⁰ Depending on the type of delegation, the agency can adopt rules which are binding on third parties, although this whole issue is extremely opaque and muddled.⁶¹ Sometimes partners will create a private non-for-profit organisation to accomplish a particular task. For instance, the federal government and all federated entities except Québec did so to elaborate tools for sharing electronic information in the field of health care. The corporation was created by Ottawa, but its members are the Deputy-Ministers of Health from every participating federal partners.⁶²

In Belgium, a few agreements have organs endowed with legal personality. One was at the heart of the first ruling on the constitutionality of a cooperation agreement by the Court of Arbitration.⁶³ Another, the International Trade Agency, was introduced following the 2001 constitutional reform which increased regional powers in that area.⁶⁴

⁵⁶ AC portant création d'un Comité consultatif de bioéthique (FED + 3C), 15.01.93 (15.06.95); AC relatif à la coordination des activités liées à l'énergie (FED + FI R), 18.12.91 (26.02.92); VELAERS, Jan, *De Grondwet en de Raad van State : Afdeling wetgeving* (Antwerp: Maklu, 1999) 877.

⁵⁷ 595 out of the 880 IGAs accessible in full-text.

⁵⁸ POIRIER, Johanne “Les relations fédérales-régionales relatives à Bruxelles : contrôle et coopération”, (1999) 4 *RBDC* 351-370.

⁵⁹ On interdelegation: *supra*, 1.2.4.4

⁶⁰ Ex. of such statutory delegation: *Farm Products Agencies Act*, RSC (1985) ch. F-4, s.31.

⁶¹ *Infra*, 5.3.2.

⁶² Health Infoway, 2002 *Annual Report*, www.canadahealthinfoway.ca, and email exchanges (08.04.2003)

⁶³ CA17/94.

⁶⁴ Its powers are, however, extremely limited: POIRIER, *Lambermont*, 77.

3.2 The implicit functions of IGAs

Over and beyond the obvious policy co-ordination and the development of mechanisms of consultation, information-sharing or joint management, IGAs play a number of less transparent roles. Sometimes those “implicit” functions are deliberate, or at least clearly understood by the signatories, although not announced publicly. Occasionally, agreements even play functions which the parties did not intend from the beginning.

3.2.1 Para-constitutional engineering

3.2.1.1 Circumventing and blurring constitutional boundaries

As we shall see in Part II, governments cannot officially modify the formal distribution of powers through an IGA. In other words, federated entities cannot, individually or collectively, transfer jurisdiction over education, health or intra-provincial transportation to the federal government.⁶⁵ However, agreements can enable governments to delegate functions to one another, thus modifying the *exercise* of constitutional competences.⁶⁶ The line between the two can be extremely thin, and is easily walked by federal partners.

The most remarkable way in which an IGA can be used to circumvent constitutional boundaries, is when one party undertakes not to exercise one of its constitutional competence in favour of another one. Even if temporary, and revocable, such commitments are obviously aimed at dodging the formal distribution of competences. For instance, in 1942, as part of war effort, Canadian provinces agreed to “loan” their taxation powers to the federal government.⁶⁷ In exchange, they were to receive certain block grants. These loans were contained in a series of IGAs. The legal nature of these agreements and their justiciability is examined in Part II of this thesis. At this point, I simply want to underline the obvious para-constitutional function played by these agreements: they amounted to undertakings by provinces *not* to exercise their constitutional power to perceive taxes.

Delegating functions to another order of government is another means of circumventing a formal federal architecture. We have seen that in both the Canadian and Belgian federations, every order of government normally has its own administrative structure to implement the legislative and regulatory norms adopted by that order. Nevertheless, in some cases, partners have found it expedient to mandate another order with the

⁶⁵ In this context, the Supreme Court of Canada concerning the Vancouver public harbours is an anomaly: *supra*, 3.1.1.5.

⁶⁶ While the delegation of legislative function is unconstitutional law, this is not the case of delegation of administrative responsibilities from one order of government to another: MAGNET (1998) 85-107.

implementation of one's legislation. This is the case of the Contravention arrangement mentioned earlier, pursuant to which provinces agree to prosecute violations to federal statutes in exchange for a portion of the fines perceived.⁶⁸ While not unconstitutional, this type of arrangement implies a degree of constitutional remodelling. It transforms – even partially – a dual federal system into an administrative one.

A recent example illustrates how parties can make creative use of agreements for constitutional engineering purposes, when the formal distribution of powers is a hindrance to their public policy objectives. It will be recalled that in Belgium, education is a Community matter, while policies for reducing unemployment is a regional one.⁶⁹ Prior to the 2001 reforms concerning the financing of Communities, a cooperation agreement was concluded between the French Community and the Walloon Region, pursuant to which the former would, amongst other things, subsidise the purchase of computers for schools. The bills purporting to give assent to the agreement were assessed by the Legislative section of the Council of State (CSLS).⁷⁰

Before the CSLS, the Walloon Region ingeniously argued that better training (over which the Region has no direct competence) would, in the medium term, reduce unemployment (an area over which it does have legislative competence). The CSLS rejected the submission, considering the link too tenuous. Permitting this type of intervention would generate confusion over constitutional responsibilities, which are very largely distributed on an exclusive basis. In other words, the Council of State denied that an order of government could conclude cooperative agreements to finance a policy initiative over which it does not have legislative competence. The bills purporting to give assent to the agreement were therefore – in the view of the Council of State - unconstitutional.

As we saw in Chapter 1, a legal opinion by the CSLS is not binding on governments. In response to the criticism, the Walloon Region and the French Community simply modified the title of the agreement – to mask the mere financial arrangement at stake – and adopted the agreement without altering its content.⁷¹ Technically, such an agreement could be the

⁶⁷ *Re Taxation Agreement Between the Government of Saskatchewan and the Government of Canada*, (1946) 1 WWR 257 (arbitration tribunal).

⁶⁸ *Supra*, 3.1.1.4.

⁶⁹ Moreover, unemployment insurance falls within federal competences, but that is not relevant for the present purposes.

⁷⁰ CSLS 30.037-2 (28.06. 2000) Doc Parl, 92 CCF, 1999/2000, 17 and CSLS 30.102/2, (24.05.2000) Doc Parl, CRW 124 (1999-2000) 18.

⁷¹ From an agreement “relative to the refinancing of the French Community by the Walloon Region” became an agreement relative to the “financing of cooperation in the context of interlocking policies” (“*politiques croisées*”): The “*exposé des motifs*” is particularly candid on this. Noting the Council's opposition to modification of rules of fiscal federalism by agreement, the government of the French Community states “*Il convient, pour éviter toute confusion sur le plan des principes juridiques, de*

object of an *a posteriori* constitutional challenge before the Court of Arbitration. However, it is unlikely that the parties would ever subject to that Court an agreement they have concluded. Affected third parties (schools of the French Community in the Brussels Region, for instance?) would face a number of procedural (standing rules are more stringent in Belgium than in Canada) and financial hurdles.

Through these creative schemes, federal partners can blur constitutional boundaries. In some cases, ambiguity may be a key to reaching an agreement. For instance, the federal government and Québec interpret differently a major bilateral agreement on labour market policies. Ottawa maintains that the agreement serves to implement the federal *Employment Act*. With one minor exception, Québec disagrees and posits that the policy areas covered are not founded on the federal power relative to unemployment, but on the provincial powers over education and labour policy for which Québec receives federal funds grounded on the federal spending power. Despite their disagreements over principles, the two parties reached an agreement in order to consolidate a particular policy objective. It is likely that without this grey zone regarding constitutional competences in the IGA, it simply could not have concluded. The flexibility of IGAs allows for this “*double-reading*” phenomenon.

Cooperative agreements can be useful tools of “good governance”. To take an example discussed above, it is better to have computers in schools and local sports facilities, regardless of who pays for them. However, agreements of this nature are instruments through which federal partners stretch the federal architecture, outside the strict rules of constitutional amendments in the Canadian case, and outside the exacting system of double majority legislation in Belgium. Such agreements are thus tools of constitutional engineering, on the margins of constitutional rules.

3.2.1.2 IGAs as an alternative to constitutional reform

Given their flexibility and the limited degree of parliamentary and public scrutiny to which they are subjected, IGAs are often called to play another “para-constitutional” function: that of alternatives to constitutional reform.

By contrast to the incessant institutional reordering that characterises Belgian political life, constitutional reforms are extremely rare in Canada, particularly with regards to the distribution of powers.⁷² Since the 1982 constitutional patriation, which Québec never

modifier l'intitulé de l'accord, même si, sur le plan politique, les termes employés étaient particulièrement importants”: Doc Parl, CCF, 95 1999/2000, 3.

⁷² The constitution was modified in favour of the central government in 1945 and 1964 (unemployment insurance and pensions, with provincial supremacy in the latter case, ss. 91.2A and 94A, *Constitution Act*, 1867). In 1982, provincial competences over natural resources were specified (s. 92A).

endorsed, and the subsequent failures of the Meech Lake and the Charlottetown Accords, constitutional reforms have been widely considered beyond reach. In that context, IGAs cannot serve as an alternative to a genuine threat of constitutional amendment.⁷³ They can, however, be used to obviate the need for such reform. In other words, IGAs enable governments to structure their relations so as to bypass hard constitutional issues, or to find pragmatic solutions that would be unattainable in the context of more visible and politically charged negotiations. The very existence of IGAs may, in fact, contribute to the belief that constitutional reforms are both impossible and unnecessary. From that perspective, IGAs do not only serve as a substitute to constitutional reform, but also as a pretext for avoiding them.

For example, since the mid-1990s, a number of multilateral and bilateral agreements have been concluded between Ottawa and the provinces, to show that federalism could be renewed through “non-constitutional” means. Most of them were concluded under the umbrella of the so-called “Social Union Framework Agreement” (SUFA) a loosely worded agreement between Ottawa and all provinces and territories (except Québec) which was originally designed to clarify respective roles and responsibilities, but which ended up legitimising federal incursion into areas of provincial responsibilities in the field of social protection.⁷⁴

“Post-SUFA” agreements are presented as “non-constitutional solutions” to constitutional problems.⁷⁵ For SIMMONS, they “have become synonymous with the non-constitutional rebalancing approach”.⁷⁶ While I agree with the diagnosis, I would not term this trend as “non-constitutional” an expression which suggests that constitutional norms are irrelevant or that the process is neutral from a constitutional perspective. IGAs used to circumvent the formal distribution of competences or to avert constitutional reforms are anything but constitutionally neutral. They are tools of constitutional engineering on the margins of the Constitution.⁷⁷

In remarkable contrast to the Canadian situation, Belgians politics are based on constant constitutional reforms. Yet, cooperation agreements also play an avoidance role. Indeed, constitutional negotiators sometimes postpone the resolution of a controversial

⁷³ In Switzerland, intercantonal conventions are often understood as a “shield” against centralisation. See for instance, the creation of the Conférence Universitaire Suisse, seen as a protection against the potential transfer of competence over university placement from the cantons to the federal order: POIRIER, *Report*, 52-53.

⁷⁴ GAGNON, Alain G., SEGAL, Hugh, *The Canadian Social Union Without Québec: 8 critical analysis* (Montreal : Institute for Research in Public Policy, 2000).

⁷⁵ LAZAR (1998).

⁷⁶ SIMMONS (2003) 7.

⁷⁷ POIRIER, Johanne, “Intergovernmental Agreements in Canada: at the cross-roads between law and politics” in INSTITUTE OF INTERGOVERNMENTAL RELATIONS, *The State of the Federation 2001-2002* (Kingston: IIGR, forthcoming) [POIRIER, *Cross-roads*].

issue, by agreeing that it will be resolved at a later stage through a “compulsory” agreement. This trend was particularly notable in the 2001 round of reforms.⁷⁸

Amendments to the Belgian Constitution require a qualified majority in both Chambers of the federal Parliament.⁷⁹ Modification of a DMA is even more exacting.⁸⁰ While this is demanding – and it theory should provide a certain stability to constitutional texts! – only federal parliamentarians are involved in this process. In other words, constitutional reforms are the sole prerogative of central authorities.⁸¹ When aspects of a reform are “teleported” to compulsory cooperation agreements, to be concluded by federated entities, with or without federal authorities, the impact is to grant those entities a direct say in constitutional reforms from which they are officially excluded. The result is not an avoidance of constitutional reform, but a dodging of formal constitutional procedure.

3.2.1.3 IGAs to render constitutional reform effective

In Belgium, IGAs are not only a means of circumventing formal constitutional procedure. They also serve to render them effective.⁸² In fact, “compulsory” agreements are built-in the federalisation process. In Chapter 2, we saw that the very introduction of cooperative agreements in the Belgian legal order in 1988-89 coincided with the regionalisation of matters that required a fair degree of coordination. Conditioning the effective transfer of competences to the conclusion of these agreements was a political trade-off. Parties agreed, in principle, to the constitutional transfer, but also agreed that the status quo would be maintained until the agreements were indeed concluded.

The 1993 and 2001 constitutional reforms also involved the insertion of a number of “compulsory” agreements in s.92*bis*. In 1993, the transfer of significant competences over international affairs to federated entities was partly conditioned on the conclusion of agreements on the representation of Belgium in international and European institutions. Their *jus tractati* was also conditioned on the adoption of an agreement relative to “mixed treaties”.⁸³ The scission of the province of Brabant in the wake of the 1993 reform was also

⁷⁸ POIRIER, *Lambermont* 75-83.

⁷⁹ A majority of two-thirds in the House of Representatives and the Senate, with a quorum of two-thirds of members present.

⁸⁰ It requires the same qualified majority overall, plus a single majority in each of the French and Dutch-speaking groups in each assembly.

⁸¹ This startling state of affair is partly alleviated by a very limited presence of representatives of the Communities in the Senate (but not of the Regions), the rest of the Senators, being elected directly.

⁸² This function may therefore not be as “implicit” as the other one, but it bears to be examined in the context of other para-constitutional functions.

⁸³ In fact, alternative, cooperative measures were put in place until the “compulsory” agreements were concluded, which arguably had the effect of speeding up their adoption: by partial derogation to the situation of other such “compulsory agreements” (*supra*, 2.2.3.1), the *status quo ante* had already changed: s.92*bis* (4*bis*)(2) and (4*ter*)(2).

conditioned on the conclusion of a compulsory agreement. In 2001, nine compulsory agreements constituted an integral part of the process of increasing regional fiscal autonomy and the transfer of certain competences to federated entities.⁸⁴ Four of five “optional” agreements were also negotiated concurrently with the constitutional reforms. In all these cases, the texts amending the DMAs at issue (on financing and the distribution of competences) were drafted alongside the IGAs. The role of IGAs in the process is undeniable.

3.2.1.4 Adoption of asymmetrical arrangements

IGAs are particularly well adapted to respond to asymmetrical constitutional structures, whether those are officially recognised or not. For instance, in Belgium, where the institutions of the Flemish Community and Region have been merged, there is no need for formal cooperation between them: co-operation is, in a sense, integrated in the functioning of the institutions. This institutional fusion has not occurred on the French-speaking side of the country, thus increasing the need for policy coordination of very dispersed legislative and executive powers between the French Community and the Walloon Region, for instance. This leads to a greater number of formal horizontal agreements between the French-speaking entities, than between the Flemish ones, or between the former and the latter. The funding of computers in schools of the French Community located in Wallonia is good examples.⁸⁵ The particular situation of the Brussels-Capital Region, as both a region and the capital of Belgium, has led to the adoption of an agreement through which federal authorities intervene both financially and in priority-setting in matters which are, *a priori*, regional.⁸⁶ There is no similar federal intervention in the other Regions.

In Canada, where asymmetry is political anathema in many official circles,⁸⁷ bilateral agreements between the federal government and the provinces allow for an adaptation to local needs and distinct political situations, in what appears to be an innocuous way. Hence, provinces were allowed to opt for one of three models of labour-training IGAs with Ottawa, with varying degree of decentralisation.⁸⁸ Still, today, Ottawa collects income tax on behalf of a majority of provinces, but not all of them, through a number of distinct Tax collection

⁸⁴ POIRIER, *Lambermont*.

⁸⁵ So is an IGA giving an organ of the French Community competences which the latter had earlier transferred to the Commission communautaire française: AC relatif aux modalités d'exercice des relations internationales de la COCOF (Fr C + COCOF), 30.04.98 (21.08.98, 02.12.98).

⁸⁶ AC relatif à certaines initiatives destinées à promouvoir le rôle international et la fonction de capitale de Bruxelles (FED + RBC), 15.09.93 (30.11.93). See numerous codicils in Appendix B.

⁸⁷ MAGNET, *Discontent* (1998) 90.

⁸⁸ KLASSEN, Thomas R., “The Federal-Provincial Labour Market Development Agreements” in McIntOSH, Tom (ed.) *Federalism, Democracy and Labour Market Policy in Canada* (Montreal-Kingston: McGill-Queen's University Press, 2000) 158-203, 176 ff.

agreements.⁸⁹ Similarly, given Québec's concern with preserving its dominant French-speaking character, particular vertical agreements have been concluded in the field of immigration, which is a concurrent head of power.⁹⁰ Federal authorities determine the total rate of immigration and is still responsible for other aspects of the selection, such as security or health criteria.⁹¹ Québec, can grant higher priority to the actual or potential knowledge of French in the immigrant selection process than is the case in the rest of Canada.⁹²

It is highly unlikely that such arrangements could have been established through official constitutional reforms. IGAs have an opacity and an apparent temporary nature which enable governments to actually do what they cannot officially endorse. Moreover, this can be accomplished without much public or parliamentary scrutiny. In fact, it is possible precisely because of this limited scrutiny.

3.2.2 "Regulating by contract": IGAs as tools of *realpolitik*⁹³

In her 1984 study of administrative contracts in Canada, LAJOIE adapted the "regulating by contract" formula introduced by DAINITH to denounce intergovernmental agreements as tools of centralisation, concluded under the guise of compromise and consensus.⁹⁴

The paradigm example provided by DAINITH is of a public authority with the power to legislate over a certain matter, but opts for a contractual solution instead.⁹⁵ The choice of contract in such a scenario is believed to favour compliance by the other party and to give an appearance of a more balanced power base between the public authority and the other party.⁹⁶ The ultimate threat of legislation or regulation is always implicit and this can significantly alter the content of the contract or agreement. Such contracts can thus be used as forms of indirect regulation, since one of the parties always has the option of replacing the

⁸⁹ HOGG (1998) 144-145.

⁹⁰ S.95, *Constitution Act*, 1867.

⁹¹ The first one was signed in 1971. The most recent is the Accord Relating to Immigration and Temporary Admission of Aliens, 05.02.1991 (QC00563).

⁹² José WOEHLING argues that the federal government has often insisted on concluding agreements with other provinces, in order to minimise the recognition of a special status for Québec : "Les droits et libertés dans la construction de la citoyenneté au Canada et au Québec", in COUTU, Michel et al. (dir.), *Droits fondamentaux et citoyenneté : une citoyenneté fragmentée, limitée, illusoire?* (Montréal: Thémis, 1999) 269-302, 277-279.

⁹³ Par. 2-5 of this section are from POIRIER, *Concordats* 142-143.

⁹⁴ LAJOIE (1984) 144 ff.; DAINITH, Terence, "Regulating by Contract" (1979) 32 *Current Legal Problems* 41

⁹⁵ DAINITH has used the *imperium/dominium* label to distinguish between the use of legal and non-legal techniques by government to further policy objectives: DAINITH, Terence, "The Techniques of Government" in JOWELL, Jeffrey, OLIVER, Dawn, (eds) *The Changing Constitution*, 3d ed., (Oxford: Clarendon Press, 1994) 209-236, 213 ff.

⁹⁶ LAJOIE (1984) 5.

consensual approach by a direct regulatory or legislative solution. Contract is thus used as a mode of social control, as an alternative to the exercise of unilateral normative power, but with a similar objective, and, in many respects, effect.⁹⁷

LAJOIE applies DAINTITH's analysis both to contracts between two public authorities and to intergovernmental agreements.⁹⁸ She argues that in both cases, the choice of a conventional solution is strategic. It is preferable to bring a partner - including a partner in a multi-layered State with whom one necessarily has long standing relations - to agree, rather than to impose its will through the unilateral legislative measures.

This use of IGAs to further "regulatory" purposes can arise in two distinct situations. First, it can indeed replace a unilateral legislative solution. This is possible when the central government has the constitutional power to make legislation binding on federated entities.⁹⁹ Even when the legislative route is available, it may be more expedient, or politically acceptable, for central authorities to negotiate an agreement, rather than to impose its will unilaterally. Compliance and cooperation are more likely to be forthcoming if the other party participates in the elaboration of the new norms. In the end, however, the threat of legislation is always there, possibly affecting the liberty of the federated entities. This is very similar to the choice of new public management strategies with semi-autonomous bodies, or even the private sector.¹⁰⁰

Secondly, IGAs can be instruments of "regulation by contract" when central authorities do not have the power to impose their will on the constitutive units by legislation, but "make them an offer they cannot refuse". In other words, in a federation in which the federated entities are not in a subsidiary position to the central government, as is the case in Belgium and in Canada, the regular normative route is not available. "Contract" is not merely the preferred option, but often the only one available.¹⁰¹ Accepting the terms of an agreement may be the only way for a constitutive unit to obtain financial contributions from (*ex hypothesi*) wealthier central authorities. Refusing to sign such agreements could result in depriving the population of services, which is neither good public administration, nor good electoral politics.

⁹⁷ HARLOW, Carol, RAWLINGS, Richard, *Law and Administration* (London: Butterworths, 1997) 211; QUERTAINMONT, Philippe, "Les nouveaux instruments contractuels utilisés par l'Administration et la compétence du juge administratif", (2000) 1 *TPB* 39-52.

⁹⁸ LAJOIE (1984) 144 ff.

⁹⁹ As is the case in the United States, for instance, where the conclusion of compacts has been described as an alternative to preemptive legislation by Congress, although this trend may have slowed down given difficulties associated with the creation of formally binding compacts: ZIMMERMAN (1992) 55-81, 146 and 194 ff.

¹⁰⁰ In Belgian context: QUERTAINMONT (2000).

¹⁰¹ I put "contract" in brackets, of course, because this begs the question of whether intergovernmental agreements can be considered contracts.

In Canada, IGAs are the prime instrument through which the federal government funds programmes over which it does not have legislative competence. For instance, through vertical IGAs, federal authorities assist (and encourage) provinces to provide educational services in minority official languages.¹⁰² While the federal government has legislative authority over the promotion of official languages in federal matters and institutions, it does not have this competence in matters of education, which is an exclusive provincial matter. Agreements are thus a financial conduit, where direct normative action would not be possible. Similarly, with a few exceptions, health-care is a provincial matter. The federal government transfers hundreds of millions of dollars to provinces annually so that they may fulfil their constitutional responsibilities in matters of health care. These transfers are essentially founded on the federal spending power, although the 2003 agreement also included inter-provincial undertakings to coordinate policy initiatives, develop comparable measures of quality, develop pharmaceutical care and so on.¹⁰³

Given the permissive attitude of Courts regarding the federal spending power in Canada,¹⁰⁴ and given the needs of their population, provinces find it hard to resist a federal incursion into their sphere of jurisdiction when it is accompanied by significant financial contributions. The threat of the spending power acts as an incentive for provinces to reach agreements. From that perspective, IGAs reflect actual imbalances in the federation. They can also exacerbate such imbalances. These questions are of course banal to students of fiscal federalism. The point I wish to underline is that the inequality of the parties may be masked by the use of apparently consensual IGAs.¹⁰⁵

On the other hand, even when the federal government can “go it alone”, it may find that politically, it is preferable to reach an agreement with a province. This would appear to be the case of the agreement between Québec and Ottawa regarding the Millennium Scholarships. Even if the Québec government objected to the Scholarships scheme, it probably could not have stopped the federal government from actually putting it into place independently, in parallel to its own bursary programme. Politically, however, both parties felt that an agreement was preferable. In the end, Québec managed to avoid most direct

¹⁰² Special Agreement for the Implementation of Francophone School Governance, 01.04.1997 (NF 01636).

¹⁰³ Agreement on Health Care Renewal, 2003. It is very likely that Québec did not take part in this (unsigned) agreement, because of the first function – an instrument of the spending power – rather than the second.

¹⁰⁴ Over the years, courts have established only one condition: the spending by one order of government must not “in its essence” amount to regulation of a matter falling within the competency of the other order: *YMCA v. Brown*, [1988] 1 S.C.R. 1532, 1549. See also *Eldridge v. BC*, [1997] 3 SCR 624, 647: YUDIN, David W.S., “The Federal Spending Power in Canada, Australia and the United States” (2002) 13 *NJCL* 437-484, 462.

¹⁰⁵ As can be the case with private contracts or government contracts, of course. IGAs governing conditional grants have been assimilated to “standard form contracts” (“*contrats d’adhésion*”) LAJOIE (1984) 155.

transfers to individuals and to ensure that the federal funds were used to complement its own means-tested system.

In other words, power relations depend on power, and in complex political systems, power is not necessarily a one way-street. This is particularly true in Belgium, where power games are played between federated entities, and between the latter and the federal government. The games do not always end in the latter's favour. Several cooperative agreements examined earlier illustrate the role they can play in federal *realpolitik*. Given the double-layer of federated entities, this does not only happen between federal and federated authorities, but between the latter as well.

For instance, in the early 1990s, the Walloon Region managed to secure a role in the conduct of certain Community affairs through a joint regional-Community organ. The French Community could not resist, as it was in desperate need of funds.¹⁰⁶ In fact, that agreement paved the way for the official transfer of competences from the French Community to the Walloon Region in 1993-94.¹⁰⁷ Similarly, the agreement concerning the purchase by the Walloon Region of computers for schools under the jurisdiction of the French Community, reflect the power imbalance between those two entities.¹⁰⁸

Realpolitik also lead to an invasion of federal competences by powerful federated entities. This is the case, for instance, of a 2002 agreement concerning the funding of the rail service, which is still officially an exclusively federal matter. There is, however, strong pressures from the North of the country to have the responsibility for the railway system transferred to Regions, that are in charge of other means of transportation. In the meantime, any substantial public investment in rail transportation requires the consent of the federal government, which is, off course, made up of an equal number of Flemish and of French-speaking Ministers.

Certain Flemish Ministers blocked any deal to refinance the national railway company, unless the deal took the form of a cooperation agreement involving the Regions, which have no constitutional competence in the matter! It allows Regions to invest in railways on their own territory. This increased the visibility of federated entities, and possibly paved the way for an eventual "regionalisation" of railways. The legislative section of the

¹⁰⁶ CA 17/94; COENRAETS, Philippe, "Réflexions sur le contrôle de constitutionnalité des accords de coopération", (1995) 19 *Adm publ* 216-227.

¹⁰⁷ This transfer took the form of six distinct legislative instruments, by three federated entities (WR, FrC, COCOF), all published: MB 10.09.1993. Since this transfer can only be revoked with consent of the recipient, it amount to a true transfer of competences: LEROY, Michel, SCHAUS, Annemie, "Les relations internationales" in CENTRE DE DROIT PUBLIC, *Les réformes institutionnelles de 1993, Vers un fédéralisme achevé* (Brussels: Bruylant, 1994) 25-70, 41(n49).

¹⁰⁸ *Supra*, 3.2.1.1.

Council of State judged the agreement unconstitutional, but its non-binding opinion was disregarded.¹⁰⁹ This agreement partakes of what certain analysts denounce as the “confederal” drifting of Belgian politics.

3.2.3 Symbolic functions

The previous example indicates the strong symbolic meaning that governments can attach to IGAs. Rumour has it that in the 2001 round of negotiations, some Flemish nationalists insisted on the conclusion of a fixed number of cooperative agreements, regardless of their actual policy significance. Symbolically, they wanted to see Flemish authorities as an integral part of the process. Agreements are assimilated to treaties, and their conclusion is a token of greater sovereignty. They are symbols of a growing distancing from central institutions.

On a related note, it will be recalled that in 1993, new rules concerning parliamentary assent to cooperation agreements were introduced. They replicated the rules that applied, until then, to international treaties. Some deny that this insistence on parliamentary involvement was grounded on concerns for democratic control over instruments of executive federalism. They suggest, rather, that modelling rules concerning cooperation agreements on those relative to treaties increased the prestige – and autonomy - of parties to the agreements.¹¹⁰

Interestingly, the refusal to conclude IGAs may also be a symbolic act. The Quebec constitutionalist F.R. Scott suggested that Québec’s insistence on levying its own income taxes in 1954, rather than allowing Ottawa to do it on its behalf was a matter of “honour”. In his view, the war-time taxation agreements “became mixed up with feelings of status and prestige” so that “income tax itself, became in a sense, a symbol of cultural identity”.¹¹¹

Agreements negotiated in Canada in the 1990s, in the wake of the Social Union, provide a good illustration. Since Québec generally up-holds a strict dualist conception of the Canadian federation and a maximalist interpretation of provincial powers, it is reluctant to conclude agreements that seem to legitimise the role of the federal government in spheres of

¹⁰⁹ CSLS 32.367, Doc Parl VI R (2001-2002) 269, no.1, 30.10.2001; AC relatif au plan d’investissement pluriannuel 2001-2012 de la SNCB (FED + 3R), 11.10.01 (27.11.02 ; 26.03.02).

¹¹⁰ Paradoxically, of course, the rules governing parliamentary assent to treaties were also being modified, as we saw in Chapter 2. I could not find any explanation for the insistence on the application of the old rules to cooperation agreements, rather than a parallel to those applicable to treaties. It would appear that the distinction was overlooked in the heat of the negotiations!

¹¹¹ SCOTT, F.R., “The constitutional background of taxation agreements”, (1955) 2 *McGill LJ* 1-10, 10. It bears pointing out that Québec was insisting on perceiving taxes which it can, pursuant to the Constitution Act 1867, perceive. The “honour” was symbolic, but also was tied up with the “original deal”.

provincial competences. While it often shares the policy objectives of other members of the federation, and participates actively in intergovernmental discussions, it regularly refuses to sign formal agreements that result from those discussions. In many cases, the impact in terms of policy is negligible.¹¹² When it is not, Québec authorities will make an exception, but may insist on some other mark of distinctiveness. For instance, as was mentioned earlier, the Ottawa-Québec labour market agreement does not expressly refer to the federal Unemployment Insurance Act, while all the other bilateral agreements do so. Québec also insisted on a distinct dispute resolution process.

The multiple footnotes to the multilateral agreements which attest to Québec's refusal to join are, however, highly symbolic.¹¹³ These footnotes can be interpreted either as the proof of Québec's alienation from the rest of Canada, or as a testimony that asymmetry is alive and well, despite official discourse.

Conclusions

IGAs play a variety of functions in the Belgian and Canadian federal systems. Many aim at articulating exclusive but interconnected competences, or at sorting out respective responsibilities, when competences overlap. The focus changes slightly whether competences are distributed on an exclusive basis, are concurrent or shared, but the fundamental purpose is the same: it is to determine who does what, and who pays for what. A substantial number of IGAs also play a range of procedural functions: they introduce communication mechanisms, set up dispute resolution mechanisms, or establish joint organs.

IGAs also fulfil a number of less transparent roles in inter-federal relations. They are used to circumvent inconvenient constitutional boundaries and introduce asymmetrical arrangements. While in Canada, IGAs tend to be used to palliate the impossibility of constitutional reform, a Belgian particularity is the recourse to IGAs as an integral part of the federalisation "by dissociation" process. In this context, however, agreements are used as a means of involving federated entities in the process of constitutional transformation from which they are officially excluded. Given fiscal imbalance in the Canadian federation, and judicial tolerance for the use of the federal "spending power" in areas of provincial competence, IGAs are indirect tools of regulating by contract. Despite stricter judicial scrutiny, there may be a developing trend towards such uses of IGAs in Belgium also. While in Canada this use of IGAs is almost exclusively vertical (federal to provinces), in Belgium, the power games are much more complex. Given the double-strata of federated entities,

¹¹² KLASSEN (2000) 167.

IGAs can also serve as tools of horizontal “regulating by contract”. Moreover, the strength of certain federated entities (the joined Flemish Region and Community) faced with the inherent bipolarity of central authorities has enabled the former to use IGAs as a means of intervening in federal matters.

¹¹³ NOËL, Alain, “Without Quebec: Collaborative Federalism with a Footnote”, Working Paper (Montréal: IRPP, 2000).

CONCLUSIONS TO PART I

IGAs intervene in just about every area of public policy in both Belgium and Canada. They are surrounded by a greater degree of formalism in the former, where their conclusion is notably authorised through a quasi-constitutional provision. This is consistent with other aspects of Belgian cooperative federalism in Belgium, which are also the object of explicit legislative provisions. Whether this legislative grounding actually affects the status of IGAs is examined in Part II of the thesis. Despite the absence of an equivalent legislative framework in Canada, methods of negotiations, conclusion, implementation and even denunciation of IGAs are relatively similar in both systems.

IGAs play a wide variety of roles in federal regimes. In Belgium, federal partners conclude agreements to articulate the exercise of exclusive but closely connected competences, while in Canada, IGAs serve to sort out responsibilities in cases of overlap. IGAs are used to pool resources, create joint bodies, outline communication processes. But IGAs are also tools of para-constitutional engineering and instruments of power games between components of federations. This is notably the case when they are used as conduits for the spending of funds by one order of government in a field over which it has no official constitutional competence.

Notwithstanding certain differences largely due to the historical foundations of each federation, and a distinct method of distributing competences between orders of government, in practice, intergovernmental agreements play a number of similar functions in the two federations. The first branch of my working hypothesis is thus largely confirmed. In Part II, we turn to the second branch of that hypothesis pursuant to which despite this similarity of functions, IGAs are apprehended in radically different manner by the Belgian and Canadian public law systems.

PART II

THE LEGAL STATUS OF INTERGOVERNMENTAL AGREEMENTS IN BELGIUM AND CANADA

INTRODUCTION

Having drawn a general picture of the practice of intergovernmental agreements in Belgium and Canada and examined the various functions these instruments play in those federal regimes, this second part of the thesis tackles the more difficult problem of their intersection with the legal and judicial systems.

Over the past few decades, public authorities have resorted to instruments with the appearance of contracts in their dealings with the private or para-governmental sectors.¹ These instruments share characteristics with contracts: they are negotiated and rest on the (at least apparent) parties' consent. Yet, because of the inherent power of state authorities to impose rules in a unilateral form, these instruments are not divorced from the traditional unilateral regulatory process. The regulatory objective is similar, but the method differs.² The legal character of these hybrid instruments defies traditional classifications in domestic legal orders. A Belgian author described his attempt at pinning down the legal nature of these new instruments as "seeking the undiscoverable".³

IGAs are one aspect of this phenomenon of the contractualisation of law and of political relations and are just as difficult to characterise pursuant to classic legal categories. IGAs have both regulatory and contractual characteristics. This "*confusion des genres*" poses an obvious challenge to the determination of their legal status, since the legal systems of both federations have traditionally distinguished between legal norms of unilateral origin and those of a contractual origin. While legal philosophers have underlined the interdependence between those two categories,⁴ legal systems have not adapted to incorporate these odd instruments that potentially embrace both sources of normativity. Hence, observers in both Belgium and Canada are perplexed by the nature of the odd – if ubiquitous – tools of federal governance that are negotiated as contracts between executives, but that can hardly be understood as having no normative impact on the citizens of the orders of government involved.

¹ "Contrats de gestion" with state agencies, for instance: QUERTAINMONT (2000).

² ISSALYS and LEMIEUX (1997) 145-150 ; MOCKLE, Daniel, "Gouverner sans le droit : mutation des normes et nouveaux modes de régulation", (2002) 43 *C de D* 141-210, 155 ff.

³ DeROY, David, "La nature juridique des contrats de gestion d'entreprises publiques: à la recherche de l'introuvable" (2002) *JT* 393-401. In the end, the author describes them as "*sui generis*" (401).

⁴ OST, François, "Les lois conventionnellement formées tiennent lieu de conventions à ceux qui les ont faites", in GÉRARD, Philippe et al. *Droit négocié, droit imposé?*, (Brussels: Publications des Facultés universitaires St-Louis, 1996) 17-107, 106.

Given the existence of a relatively detailed legislative framework concerning IGAs in Belgium, as well as a certain doctrinal interest in Belgian cooperation agreements, one might assume that the question of their legal character would be well established, at least by contrast with the opaque and *ad hoc* Canadian practice. In fact, the status of IGAs is shrouded in uncertainty in both federations, although not always for the same reasons or with regards to the same issues.

My working hypothesis was that IGAs were considered to be legally binding instruments in Belgium, while their legal status was much less secure in Canada. As will become apparent, this hypothesis is only partially confirmed. There is an undeniable *presumption* that IGAs are legal instruments in Belgium, while the contrary presumption arguably prevails in Canada. But mostly, it is the very conception of the nature of the instrument that differs between the two federations.

Belgian analysts have from the inception of formal cooperation agreements in 1988-89, described them as a new type of “norm” of public law. The consensual origins of cooperation agreements are acknowledged, but the emphasis is almost exclusively on the “normative” character of the instrument, in the more classical sense of state-generated (traditionally unilateral) norms. In Canada, by contrast, IGAs are almost exclusively analysed through contractual lenses. Not only is the consensual origin of the instrument emphasised, but its potential legal force is analysed through the prism of government contracts, which are, in turn, largely treated as a variation of *private* contracts.⁵ Belgian public lawyers show disbelief at the suggestion that instruments so clearly determinative of the management of *public* affairs in a federal regime, and which almost inevitably impact on citizens, can be analysed as mere contracts.

In view of these major differences, it could have been easier to analyse the status of IGAs in the two federations separately. However, in order to challenge what appears as “evidences” on the part of the courts and in literature in each federation, I have sought to examine IGAs both as contractual and as “normative instruments”, in both federations.⁶ This approach sheds some light on facets of IGAs which analysts within each system tend to downplay.

As a point of lexical clarification, it should be pointed out that while contractual instruments obviously undeniable source of law,⁷ and are therefore normative, in the remainder of the thesis, the qualifier “normative” (as in “normative instrument”) will be used in its “*erga omnes*” sense. In other words, the question is whether IGAs, which all contractual foundations, can be the source of law of a general character, and not only of rights and obligations to their signatories.

Part II is divided into three chapters. Chapters 4 and 5 respectively explore the status of IGAs as contractual instruments *inter partes* and as normative instruments *erga omnes*. Chapter 6 deals with the localisation of agreements in the hierarchy of legal norms, the main issue being whether an agreement concluded between several parties can be unilaterally repudiated by one of them, notably through legislative means.

⁵ *Infra*, chapter 5.

⁶ Swiss law distinguished between IGAs that are “purement obligationnelles” and those which are “normatives”. The latter can either be directly normative – if they are self-executing – and impose obligations or grant rights to third parties, or indirectly self-executing if they call for modification of the domestic legal orders of the parties to the convention. See report, pp. 64 ff. ABDERHALDEN, 1999b.

⁷ Although it is admitted that contractual instruments are also a normative instrument *inter partes*: HOULE, France, *Les règles administratives et le droit public: aux confins de la régulation juridique* (Cowansville: Yvon Blais, 2001) 3.

CHAPTER 4: IGAs AS CONTRACTUAL INSTRUMENTS

Introduction

All IGAs have consensual foundations, that is, they result from negotiations; they are bargains which give rise to more or less precise undertakings. Chapter 5 will examine scenarios in which these negotiated instruments obtain a particular legal force *erga omnes* through the intervention of an external norm (constitution, legislative instrument) or potentially through assimilation with regulations. The present chapter seeks to assess when an instrument with consensual foundations is legally binding *inter partes*.

Defining a contract in one particular legal system is already a challenge, let alone in a comparative perspective. For the present purposes, the following working definition will be used: an IGA as a contractual instrument is a text¹ through which at least two governments agree that at least one of them will do or refrain from doing something that is licit and possible. This, however, is not sufficient. For this agreement to be considered as a contractual instrument, it has to cross the threshold that distinguishes political undertakings, from legal ones. It has to generate obligations of a juridical character.

Tests for delineating the threshold of juridicity, that is, the point at which an agreement moves from the moral or political sphere to the legal one, have been developed in every areas of law in which agreements are made.² The reasoning is often surprisingly similar in all these contexts, as is the perplexity of jurists confronted with “gentlemen’s agreements”. When does a binding contract, as opposed to a moral agreement, arise between private parties? When do States or constitutive units of federations conclude international treaties, by contrast to non-binding political agreements? The status of IGAs raises similar questions. When does an agreement which necessarily has political foundations IGA become a legally binding one *inter partes*, without the intervention of an outside norm which confers a specific value on it?³

¹ Unwritten IGAs are certainly possible, but were excluded from the present study: *supra*, General Introduction.

² See definition provided in General Introduction.

³ Since all IGAs are bound to have political underpinnings, the expression “purely political” will be used to designate agreements that remain within the political sphere. It is borrowed from INSTITUT DE DROIT INTERNATIONAL, “La distinction entre textes internationaux ayant une portée juridique dans les relations mutuelles entre leurs auteurs et textes qui en sont dépourvus”, *Annuaire de l’Institut de droit international*, Session de Cambridge, vol. 60, Tome I and II, (Paris: Pedone, 1984), Rapport définitif, T.I, 341-345 and ss.4-6 of *Final Resolution*, T.II, 285 [*Rapport Virally*].

Pursuant to classic voluntarist conceptions, a contract is the “law of the parties”. Those parties are “free to contract” or not, and consequently, free to conclude agreements which do not constitute legally binding contracts, i.e. contracts that the law would enforce. From this perspective, the status of IGAs therefore largely depends on the parties’ intention to create legal relations. In other words, it is a contract if the parties meant to conclude a contract.⁴

This voluntarist conception has known so many exceptions that doctrine in both the civil and the common law has sought alternative theories to explain the basis of contractual obligation.⁵ This thesis cannot do justice to the variety and richness of this doctrine, *a fortiori* from a comparative perspective. It is generally admitted that “objective” legal rules pose certain limits to the freedom of the parties and that “*le droit*” and contracts are mutually interdependent.⁶ This, I would argue, is particularly true of IGAs. As consensual instruments, IGAs must of course rest on the consent of the governments party to them. But this consent does not determine legal status. Other rules of law intervene and may have an impact on the status of IGAs, whatever the parties’ intention. The key is thus both to identify indicators of the parties’ intention, and rules which may affect to the legal character of an agreement regardless of that intention. This is the main purpose of this Chapter, which is divided into four sections.

The first two deal with the characterisation of IGAs as contractual instruments in Canada and in Belgium. In each case, analogies with other types of contractual instruments and potential public law impediments to legal characterisation are assessed. Given the scattered cases on the contractual character of IGAs in Canada, and the near absence of cases on this issue in Belgium, the focus of each section is somewhat different, as is their length. In the Belgian context, I focus mostly on the literature and inferences that can be drawn from the existing legislative framework concerning cooperation agreements. Contrary to my original hypothesis, the difference between the two systems is more likely a matter of

⁴ Many specialists of contract law have commented on the circularity of any definition of contracts since to know what courts will enforce, requires an examination of what courts actually do: WADDAMS, S.M., *The Law of Contracts*, 4th ed., (Toronto: Canada Law Books, 1999) 11 and 17; BAUDOUIN, Jean-Louis, JOBIN, Pierre-Gabriel, *Les obligations*, 5th ed. (Cowansville: Yvon Blais, 1998) 102; COIPEL, Michel, *Éléments de théorie générale des contrats* (Diegem: Story Scientia, 1999) 3.

⁵ WADDAMS (1999) 54 notes that lip service is still paid to the bargain theory of contracts, but that in practice, courts increasingly enforce promises by reason of reliance. Similarly, in the Belgian context, DIEUX argues that the obligatory force of a contract does not actually flow from intentions, but from the reliance created in the other party: DIEUX, Xavier, *Le respect dû aux anticipations légitimes d'autrui: Essai sur la genèse d'un principe général de droit*, (Paris/Brussels: Bruylant/LGDJ, 1995). Van OMMESLAGHE, Pierre, “La bonne foi, principe général du droit?”, (1987) *RGDC* 101-110, 103.

⁶ OST, François, “Les lois conventionnellement formées tiennent lieu de conventions à ceux qui les ont faites”, in GÉRARD, Philippe et al., *Droit négocié, droit imposé?* (Brussels: Publications des Facultés universitaires St-Louis, 1996) 17-107, 106.

contrary presumptions than a clear dichotomy between a federation in which IGAs are legally binding *inter partes* (Belgium) and one in which they are not (Canada).

The third section seeks to unpack these presumptions through an analogy with the literature relative to the law of treaties. It then proposes a series of indicia meant to assist in the characterisation of IGAs as contractual instruments in both Belgium and Canada. The fourth and final section reflects on the legal effect that IGAs can have, even when they lack sufficient indicia to cross the threshold from the political to the legal sphere.

Two preliminary remarks are in order. First, as was mentioned in the general introduction, technical questions concerning courts of competent jurisdiction to resolve disputes concerning IGAs are not addressed in the present thesis, despite their obvious relevance to the subject. If no court can “enforce” an IGA, one may well wonder about the interest of establishing their juridical character. While undeniable difficulties arise in Canada, with its judicial system largely divided along federal lines, there would always be a court of competent jurisdiction to enforce an agreement, once it crosses the line of juridicity.⁷ The issue of judicial dispute resolution may be more relevant to characterisation in the Belgian context, and it is accordingly addressed in somewhat greater detail.

Secondly, the length of this chapter is partly justified by the introduction of a number of legal issues that will be relevant to the rest of Part II, but which did not deserve a distinct chapter. This is notably the case of some public law impediments (discussed in sections 4.1.2 and 4.2.3), and of certain doctrines pursuant to which even non-legally binding IGAs could have some legal effect (section 4.4). Both of these aspects will be revisited, in appropriately summarised form, in Chapter 5.

4.1. The characterisation of IGAs as contractual instruments in Canada

In Canada, whenever they are considered as legal instruments, IGAs are assimilated to a form of government contract. The following section explores this characterisation (4.1.1), as well as some of the public law impediments applicable to government contracts that should normally affect IGAs if the analogy is sound (4.1.2). A survey of the case law relative to IGAs then provides an illustration of the inconsistent approach to IGAs as contractual instruments (4.1.3) before summary conclusions are provided (4.1.4).

It should be pointed out from the outset, however, that the following discussion does not relate to “constitutionalised” agreements, that is essentially the Terms of Entry of certain

⁷ In other words, problems of inter-jurisdictional immunity are complex but not an obstacle to either legal characterisation or ultimately to judicial resolution: POIRIER, *Cross-roads*.

provinces into the Canadian federation, as well as some agreements concerning natural resources in Prairie Provinces.⁸ Those are constitutionally entrenched and any modification now requires a formal constitutional amendment.⁹ For instance, the Terms of Entry of Prince Edward Island into the Canadian federation, provided that a permanent ferry service would be assured by the central government. In 1993, a constitutional amendment was secured to allow the ferry to be replaced by a bridge!¹⁰

The characterisation of “constitutionalised” agreements is not problematic *per se*: no one would deny they are legal instruments. Still, they have been the object of a large number of complex and often contradictory judicial rulings¹¹ and a number of unresolved legal issues remain. First, while they undeniably create binding obligations (and corresponding rights) on governments, their impact on third parties is erratic. This is examined in Chapter 5.

Secondly, there can be intense disagreement about the scope of those rights and obligations. Does an undertaking to build a railway imply the obligation to run it?¹² Does a grant in land involve the underground resources, notably gold?¹³ Is the federal government responsible for an interruption in ferry service caused by strike action?¹⁴ This is more a matter of interpretation of the IGA than of characterisation, and the substantial, complex and often contradictory case law on the subject will only be examined when it can shed light on the characterisation of IGA which are not “constitutionalised”.

A third set of legal issues arise from agreements concluded in the wake of Terms of Entry, and which were intended to modify them, or implement them. The difficulty is often that those subsequent IGAs did not follow the proper procedure for “constitutionalisation”, notably endorsement by British authorities. Are those to be characterised as constitutionalised as well? And if not, what is their status? This particular problem is relevant to the present discussion and it is addressed below in the section devoted to the case law concerning IGAs.

⁸ *Supra*, 2.2.3.2.

⁹ They are scheduled to the *Constitution Act, 1982*, s. 52(2). Amendments require proclamations by federal and provincial legislative assemblies, when the amendment does not affect other provinces: s.43, *Constitution Act, 1982*. In some cases, if the Terms only relate to the provincial “constitution”, they could arguably be amended by the province, without federal concurrence: s.45, *Constitution Act, 1982*; *Hogan v. A.G. Newfoundland*, (2000) 183 DLR 4th 225 (NFCA).

¹⁰ Proclamation of 1993, (1993) 127 Can Gaz, II, 1588.

¹¹ Only for BC: *BC v. Canada* (1889), 14 AC 295 (C.P.), rev’g (1887) 14 SCR 345 [the “*Precious Metals case*”]; *Esquimalt and Nanaimo Ry v. Treat*, [1919] 3 WWR 356 (PC); *BC v. Esquimalt and Nanaimo Railway Co*, [1950] AC 87 (PC), rev’g [1948] SCR 403 and the *Canada v. AG for BC* [1994] 2 SCR 41 [1994 *BC Railway case*]; *BANKES* (1992) 540.

¹² 1994 *BC Railway case*.

¹³ *Precious Metal case*.

¹⁴ *PEI v. Canada*, [1978] 1 FC 533 (FCA) [*PEI Ferry case*].

4.1.1. IGAs as government contracts

Agreements which are not “constitutionalised” are either characterised as political instruments, or assimilated to government contracts, the uncertainty concerning their characterisation being particularly striking.¹⁵ It may seem incongruous to use a body of law in which parties are not an equal legal footing to govern agreements between federal partners, who are not in a legally subordinate situation.¹⁶ We will see that this is the main objection raised in Belgium against the characterisation of IGAs as administrative contracts. In fact, the apparent tension created by the inherent inequality of parties to ordinary government contracts is partly resolved by the fact that all parties to IGAs are public authorities, which enjoy similar privileges, but are also constrained by similar rules of public law. With this precision, the analogy does not assault the *de jure* equality of parties.

Pursuant to the common law tradition, Canada does not have distinct institutions of “administrative contracts” subject to a specific body of law and special administrative courts.¹⁷ One consequence of the rule of law as understood in “Anglo-Canadian” law, is that the qualification of a “legal relationship having all the characteristics of a contract” must rest on concepts and rules of “ordinary law, unless statute or prerogative require otherwise”.¹⁸ Government contracts in Canada thus sit uncomfortably between the private law of contracts,¹⁹ from which the fundamental rules are derived, and a number of public law exceptions.²⁰

Glossing over nuances between the civil and the common law, a contract in private law requires parties that are capable to consenting, actual consent, a licit and possible

¹⁵ For example, the political platform of the current Québec government puts substantial emphasis on IGAs as means of resolving a number of contentious issues with Ottawa. Yet, their status is essentially presented as a series of questions: PARTI LIBÉRAL DU QUÉBEC, *Un projet pour le Québec : affirmation, autonomie et leadership, Rapport final*, 2001, 83. Academics have admitted they can give rise to binding obligations, although the contours of the institution remain uncertain: TOWNSEND, Lynda J., “Les contrats administratifs” in MINISTÈRE DE LA JUSTICE DU CANADA, *La Couronne en droit canadien* (Cowansville: Yvon Blais, 1992) 321-356, 334-335; BLACKMAN (1993) 61-62; KENNET (1993) 654 ff. A particularly ambiguous statement to that effect is found in ISSALYS, Pierre, LEMIEUX, Denis, *L’action gouvernementale* (Cowansville: Yvon Blais, 1997) 1132.

¹⁶ LAJOIE (1984) 141-182. Considering vertical agreements concluded pursuant to the federal spending power, in which there is a *de facto*, if not a *de jure*, inequality of parties, LAJOIE describes them as an “aberrant form of administrative contracts”: at 142.

¹⁷ The expression “administrative contracts” is used by some authors in Québec (including in the English translation), but the commonly used expression in English Canada is “government contracts” or “contracts by the Crown”.

¹⁸ AG (QC) v. *Labrecque et al.*, [1980] 2 SCR 1057, 1081-82, per Beetz J., for the Court. In the case, “ordinary law” is translated by “*droit commun*”.

¹⁹ Meaning the civil law in Québec, and the private law in the rest of Canada: *Laurentide Motel v. Ville de Beauport*, [1989] 1 SCR 705, 722 and 737; *Just v. BC*, [1989] 2 SCR 1228. There is (with very limited exceptions) no federal “private common law” in Canada: *Québec North Shore Paper Co. v. Canadian Pacific*, [1977] 2 SCR 1054; *McNamara Construction v. The Queen*, [1977] 2 SCR 654.

object, and (here the difference cannot be avoided) the metaphysical “cause” or consideration.²¹ Transposed in the context of IGAs, capacity and object take a public law coloration. In fact, the question is whether there are public law rules concerning the parties’ capacity to bind their respective orders of government, and subject matters which can never be the object of legally binding commitments.

Defending a voluntarist conception of IGAs as contracts, DUSSAULT and BERGEAT propose the following test for establishing the existence of a legally binding IGA :

“si les parties, d’après le contexte et la nature de l’entente, *ont entendu conclure un véritable contrat* donnant naissance à des droits et obligations réciproques, il faut considérer cette entente comme un contrat”.²²

In other words, it is a contract if the parties want it to be a contract. The situation may not be as simple, and the law of government contracts, and by transposition, the rules pertaining to IGAs, require a consideration of what I will refer to as public law impediments. They include issues of capacity and authorisation to conclude, rules of statutory appropriation (legislative authorisation to spend), as well as limits *ratione materiae*. Some of these issues go to the validity of contracts (or IGAs) rather than their characterisation as legal instruments. However, validity and legal character are closely related. It is therefore useful to consider them together, making appropriate distinctions when required.

4.1.2. Public law impediments

4.1.2.1 Capacity and authorisation

In Canada, governments can bind themselves in contract without specific statutory authorisation.²³ Problems related to the (in)divisibility of the Crown, which so preoccupied British analysts, was set aside by the Supreme Court of Canada, so that governments can undoubtedly contract with one another.²⁴ *A priori*, therefore, there is no requirement for specific legislative authorisation to conclude a binding IGA. It is not because there is no

²⁰ Public law rules are of common law origin, even in Québec: *AG (QC) v. Labrecque et al.*, [1980] 2 SCR 1057.

²¹ BAUDOUIN and JOBIN (1998). “Cause” and “consideration” are briefly discussed *infra*, 4.3.3.1.

²² DUSSAULT, René, BERGEAT, Louis, *Traité de droit administratif*, 2nd ed., T.I (Québec: Presses de l’Université Laval, 1984) 606, emphasis added.

²³ In *AG Québec v. Labrecque*, [1980] 2 SCR 1057; Furthermore, while there were traditional bars against suits in torts against the Crown (which have now been removed by statute) there were never any such restrictions for suits in contract: *Bank of Montreal v. A.G. (Que)*, [1979] 1 SCR 565, 574. ARROWSMITH, Sue, *Government Procurement and Judicial Review* (Toronto: Carswell, 1988) 109-117.

²⁴ DUSSAULT and BERGEAT (1984) 609-614; ARROWSMITH (1988) 110-124.

statute authorising the conclusion of an agreement that it cannot be characterised as a legal instrument.

The inherent capacity of governments to bind themselves in law must be distinguished, however, from the authority of particular signatories to bind their own government. This is a matter of validity, rather than characterisation *per se*. There is a huge case law concerning the validity of contracts concluded by public authorities, often subordinate bodies such as municipalities, in violation of their statutory authority. This case law is arguably of limited interest in the case of IGAs, given that executives have inherent, not statutory powers to contract.

Older case law gives confusing indication as to the need for statutory authorisation in the case of agreements concluded by individual Ministers, without the explicit endorsement of cabinet. Hence, 1930 *Troops in Cape Breton Reference*, the Supreme Court held invalid a written undertaking by a Nova Scotia Minister that the province would reimburse the federal government for the cost incurred by sending troops to quash labour unrest.²⁵ No order-in-council approved the request. Moreover, statutory authorisation for these types of arrangements had been abrogated the year before and the provincial legislative assembly refused to vote the necessary credits. The Court ruled in favour of the province, focusing mostly on the impact of the absence of parliamentary appropriation of funds. The majority however, also noted the lack of authority of the Minister to bind the government.

Since then, the Supreme Court has held the Crown to be bound by an agent holding an “ostensible” mandate.²⁶ Whether this ruling actually overturned the 1930 one is unclear. Possibly as a matter of tradition, or for a measure of security, it is common for legislative instruments to authorise specific Ministers to conclude IGAs with other governments.²⁷ This authorisation does not, however, confer immediate legal force upon IGAs. It simply conditions their validity as commitments by the executives.

While executives have an inherent power to contract, this power may be curbed by statute. In some provinces, the authority of Ministers (or others) to conclude binding agreements is somewhat altered by legislative provisions conditioning the coming into force on a signature by the Minister responsible for intergovernmental affairs, and in some cases on cabinet approval.²⁸ Hence a Newfoundland Act provides explicitly that “notwithstanding another Act or law” an IGA which is not submitted and signed by the Minister responsible for

²⁵ *Re Troops in Cape Breton*, [1930] SCR 554.

²⁶ *Verreault & Fils v. AG Québec*, [1977] 1 SCR 41, 47.

²⁷ For ex.: *Federal-Provincial Farm Assistance Act*, RSA, ch. F-10, s.1.

²⁸ *Supra*, 2.2.2.1.

governmental affairs, as well as the sectoral Minister “is not binding on the province or agency or official of the province”.²⁹

Similar statutory formalities in the case of “regular” government contracts are generally analysed as public order requirements, the non-respect of which necessarily deprives a contract of binding force.³⁰ However, much of this case law deals with contracts between private parties and public authorities that only have express contractual powers, by contrast with the executive’s inherent power to contract. Moreover, these cases arose within a single legal order. Apart from the *Cape Breton* decision, there is no case law on the impact of failure to obtain governmental consent in the context of IGAs.

It is arguable that failure to respect formalities should not excuse governments in their dealings with one another. This scenario may have more in common with the situation of sovereign States concluding treaties than with administrative contracts.³¹ Hence, the lack of signature by the Québec Minister responsible for intergovernmental relations may deprive an IGA of validity within the Québec legal order. This does not necessarily entail that the IGA could not bind the province with regards to other governments parties. It may depend on whether the signatory held an “ostensible mandate” to conclude the agreement. This could be the case of solemn agreements concluded by Deputy Ministers, for instance, or civil servants with statutory authority to conclude binding contracts.

In brief, governments can bind themselves through IGAs without specific statutory authorisation, although such authorisation is often provided. When this is the case, no issue of lack of authority would arise, except, arguably, if the particular legal order also has provisions requiring that IGAs be co-signed by a particular Minister (generally the Minister for intergovernmental affairs), or a requirement of cabinet approval. Whether such failure to comply with such domestic formalities could be opposed to another government is unclear. In any event, lack of proper authority would not affect the potential characterisation of an agreement as a “legal instrument” (assuming other criteria are met), although it could be found invalid.³²

²⁹ *Intergovernmental Affairs Act*, RSNF, 1990, ch. I-13, s.7.

³⁰ TOWNSEND (1992) 324 ; *Hôpital de l’Enfant-Jésus v. Université Laval*, 200-05-004129-925 (21.01.1993); *Abehsera v. St-Jean-sur-Richelieu*, 755-05-000177-954 (03.09.1999) (CSQ).

³¹ As is the case of art.46 of the *Vienna Convention on the Law of Treaties*.

³² The distinction is clearer in French: the agreement could be “*juridique*” but “*invalide ou illégal*”. The expression “legal” in English is a potential source of confusion. See definition of juridicity in General Introduction.

4.1.2.2 Limits *ratione materiae*

For a variety of historical and political reasons, certain federal constitutions prohibit federated entities from concluding agreements of “political” alliance, or condition the conclusion of agreements between those constitutive units to a degree of control by federal authorities.³³ The Canadian Constitution, which does not even contemplate IGAs is correspondingly silent on the issue. There are, however, three potential restrictions *ratione materiae* applicable to IGAs. The first relates to constitutional competences, the second to the capacity of the executive to tie its own discretion through contract and the third to the capacity of executive to contract to maintain, adopt or repeal legislation.

The third one is easily dealt with. There is no doubt that an IGA purporting to alter legislation, or bind a legislative assembly in any fashion, could never be understood as giving rise to legal obligations.”³⁴ This is a reflection of the separation of powers between the executive and the legislative, and more particularly, on the principle of parliamentary sovereignty.³⁵ The first and the second limitations *ratione materiae* require more attention.

- **Constitutional limitations**

As we saw in Chapter 1, the direct transfer of legislative authority from one assembly to another is prohibited in Canada, whereas the transfer of administrative/executive authority is permissible. Courts have interpreted the delegation of legislative authority, even on a revocable basis, as an abdication of legislative power and an alteration of the formal distribution of competences.³⁶ This primary prohibition signals a judicial concern that IGAs should not be used to formally modify the federal structure of the country.

I have not seen any evidence of IGAs used to explicitly transfer legislative power. Such IGAs would undeniably be unconstitutional. Given the Court’s lenience concerning delegation of administrative functions from one order of government to another, however, IGAs concluded for that purpose are likely to pass constitutional muster. In other words, using IGAs to alter the exercise of constitutional competences and thus circumvent constitutional boundaries, has been held admissible. It must be underlined, however, that interdelegation arrangements, always involve statutes and often regulations, so that the

³³ Art. I, sect 10 (3) of the American Constitution provides that interstate compacts may not be concluded without consent of the Congress. It has received restrictive interpretation: ZIMMERMAN (1996) 37; S 145 (1)(2) 1978 Spanish Constitution. This was also the case in Switzerland until 1999 (s.7 of the 1848 Constitution).

³⁴ *West Lakes Ltd. v. South Australia* (1980), 25 SASR 389, 390, cited with approval in *Re Canada Assistance Plan*, [1991] 2 SCR 525, 560 [the *CAP Reference*] 560; *Re Bowater’s Newfoundland Pulp and Paper Mills Ltd.*, [1950] SCR 608, 640; BLACKMAN (1993) 55-57.

³⁵ *Infra*, 6.2.2.2.

contractual foundation of the arrangement is often difficult to sort out from the other legal sources.³⁷

The constitutional fate of IGAs used as instruments of the spending power is more uncertain. Surprisingly for a country where clarifying the distribution of competences has been a traditional national sport, the capacity of federal partners to conclude valid contracts in matters over which they do not have legislative competence is unresolved. On the one hand, HOGG and MONAHAN maintain that since contracts are voluntary acts, it should be possible for the members of the federation to contract in any domain.³⁸ Predictably, some Québec academics take the opposite position. Hence, for LAJOIE, the fact that in Canada executive powers follow legislative powers implies that in principle, components of the federation may not contract concerning matters over which they have no legislative competence, although it could have an incidental impact on those competences.³⁹ However, LAJOIE convincingly argues that IGAs enabling one order of government to impose conditions on another one in the exclusive sphere of competence of the latter are unconstitutional.⁴⁰

This is not the place to attempt a resolution of the continuing debate on the legality and legitimacy of the spending power. While it was given the opportunity of doing so on a number of occasions, the Supreme Court has neither clearly condemned nor confirmed its constitutionality.⁴¹ Whether an IGA used as an instrument of the spending power could ever cross the threshold of juridicity is accordingly unresolved. This, as we shall see, is in stark contrast with Belgium, where, in positive law at least, cooperation agreements may not be used to circumvent the formal distribution of competences of any kind. They cannot serve to funnel funds by one order of government towards a project or institution over which that order of government does not have any legislative competence.

- **The "rule against fettering of executive discretion"**

The other limit *ratione materiae* that could preclude the legal characterisation of an IGA is the so-called "rule against fettering of discretion" or "rule of executive necessity". In common law systems, the executive branch may not abdicate its discretion to act in the public interest by binding itself for the future. This rule is generally traced back to a 1921

³⁶ *AG Nova Scotia v. AG Canada*, [1951] SCR 31.

³⁷ *Infra*: 5.3.2.

³⁸ HOGG and MONAHAN (2000) 222-223.

³⁹ *Liquidators of the Maritime Bank v. Receiver General of New Brunswick* [1892] AC 437; LAJOIE (1984) 95-96.

⁴⁰ By definition, when a competence is concurrent or shared, the spending is done in one's own sphere of competence and the constitutional conundrum simply does not arise.

⁴¹ *Supra*, 3.2.2.

English decision of first instance, concerning inter-State relations in a context of war.⁴² Despite this idiosyncratic origin, and the fact that it has rarely been applied in Canada,⁴³ this decision is frequently invoked in the context of government contracts in general,⁴⁴ and by authors discussing the status of IGAs in particular.⁴⁵ Until recently, however, it had not been explicitly invoked by courts in that context.⁴⁶ This somehow attests to the persuasive power of its underlying principle, that is, that the executive must be free to make decisions in the public interest, even when this implies going back on its word.

While the principle is generally accepted, the scope of the rule, potential exemptions to it, and its specific applications are controversial. One important *caveat* to the rule against fettering of executive discretion is that it does not apply to government contracts having a commercial character, or which bear close resemblance to the types of contractual arrangements which private parties can engage in.⁴⁷ In other terms, the rule should only preclude a government party from binding itself concerning “governmental” or “executive” powers. Faced with an instrument that derogates too much from a private contract, courts may simply disqualify it as a legal instrument. In the case of IGAs, this could lead to a characterisation as a political agreement.⁴⁸

Distinguishing between contracts of a commercial and of a “governmental” nature is tricky since policy concerns will nearly always lie behind a decision to conclude, perform or denounce a government contract, even when it has “commercial” connotations. Is the decision to contract for the purchase of defence helicopters a commercial contract or a “government” undertaking? The frontier between those two categories is not clear-cut and the case law distinguishing commercial-type government contracts from agreements that

⁴² *Rederiaktiebalaget Amphitrite v. R.*, [1921] 2 KB 500.

⁴³ A recent exception is *Martinoff v. Canada*, [1994] 3 FC 33 (FCA) in which the Court, sitting in judicial review (i.e. not in a “contractual” case between governments) held that an IGA could not have the effect of curbing the statutory discretionary power of a federal official. See also *Perry v. Ontario*, (1997) 33 OR (3d) 705 (CAO), which did not relate to an IGA, however, but to the withdrawal of an internal directive, which was supposed to remain in place until legislation or a negotiated solution had been found with an aboriginal group.

⁴⁴ ARROWSMITH (1998) 125-130; HOGG and MONAHAN (2000) 227-233; WADDAMS (1999) 475; GARANT (1996) 488-89.

⁴⁵ BLACKMAN (1993) 57-59; LAJOIE (1984) 97; MOORE, W. Harrison, “The Federation and Suits Between Governments”, (1935) 17 *J. of Comp. Legisl.* 163-209, 185.

⁴⁶ Arbitration between Newfoundland and Labrador and Nova Scotia concerning portions of the limits of their offshore areas, Award of the Tribunal in the First Phase, Ottawa, 17.05.2001 ; Second Phase 26.03.2002 : www.boundary-dispute.ca [NS-NF Arbitration; unless otherwise indicated, reference is to first phase]. For an older obligation in the context of a government contract: *R. v. Dominion of Can. Postage Stamp Vending Co.*, [1930] SCR 500 (a license granted “in perpetuity” held invalid).

⁴⁷ The caveat was mentioned in the *Amphitrite* decision itself. See also *South Australia v. Commonwealth* (1962) 108 CLR 130 (HCA) 154 [the *Railway Standardisation* case], *infra*; ARROWSMITH (1988) 126-130.

⁴⁸ *Railway Standardisation* case. It bears pointing out that Australian Courts may be more resistant to the characterisation of IGAs as legally binding than is the case in Canada: *infra*, conclusions to this section.

courts will not enforce is inconsistent.⁴⁹ Hence, the rule has come under heavy criticism. For HOGG and MONAHAN, it is “intolerably vague [...] overly broad and unsound in principle”.⁵⁰

This rule must be understood in connection with the lack of capacity of executives to terminate a contract, unless they have explicit statutory power to do so.⁵¹ This is in contrast to the situation in Belgium (or in France) where public authorities may vary a contract, in certain circumstances, subject to compensation.⁵² It is arguable that given stricter rules concerning the immutability of government contracts, courts are less willing to characterise an agreement as a legally binding instrument, when it appears to be in the public interest to allow a government to renege on its commitments.

The rule against fettering of discretion was developed in the context of opposition between private and public interests.⁵³ Its actual impact in the context of IGAs is uncertain. When two orders of government are involved in an apparent contractual relationship, the identification of the “public” whose interests must be considered is problematic. In the case of horizontal IGAs, the interests of two distinct publics are at stake: one represented, *ex hypothesi*, by the party denying that a commitment is legally binding, the other holding the opposite. In the case of vertical IGAs, two distinct visions of the interest of the same public could be in opposition.⁵⁴

To summarise, the rule against fettering of executive discretion is a potential impediment to the legally binding character of IGAs, although its precise contours remain vague. Undertakings to legislate or even to propose legislative measures on the part of governments are unlawful and would prevent the characterisation of an IGA as a legal instrument. Contracting to fetter executive action in the context of an IGA that can be assimilated to “commercial” or “private” contracts is probably permissible. Contracting so as to limit government action should technically be prohibited, although, as the case law to which we turn illustrates, courts have generally shown a great deal of tolerance of government schemes which imply (temporary) loss of discretion.

⁴⁹ *Commissioners of Crown Lands v. Page*, [1960] 2 QB 274, 287-88; ARROWSMITH (1988) 126-130.

⁵⁰ HOGG and MONAHAN (2000) 228 and 231.

⁵¹ ISSALYS and LEMIEUX (1997) 527. Otherwise, this requires direct legislative action: *Wells v. Newfoundland*, [1999] 3 SCR 199; *Cité d’Outremont v. Commission de Transport de Montréal*, [1955] QB 753.

⁵² *Infra*, 4.2.1.

⁵³ ARROWSMITH (1988) 125. This was the case in the *Amphitrite*, *Commissioner of Crown Lands v. Page*, and the *Postage Stamp Vending Co.* cases. In *Perry v. Ontario*, (1997) 33 OR (3d) 705 (CAO), the opposition was with an aboriginal community, which cannot be characterised as defending private interests. The case did not relate to a contract *per se*. However, its application in this context as recently as 1997 suggests that it is still relevant.

⁵⁴ BLACKMAN (1993) 59 argues that a strict application of the rule against fettering in the context of IGAs can have the effect of paralysing cooperation.

4.1.2.3 Parliamentary approval and appropriation

It is at least arguable that submitting an agreement to legislative approval indicates an intention on the part of the executive party to an IGA of creating legal relations. As will be seen below, courts called upon to characterise agreements do not seem to consider this factor relevant, however.⁵⁵ Put another way, the status of an agreement *inter partes* is to be assessed irrespective of its being approved by legislative assemblies. It must be emphasised, however, that the situation would be different if the IGA were “incorporated” through legislation.⁵⁶

Some controversial Australian authority also suggests that parliamentary approval has the effect of lifting the rule against fettering of discretion.⁵⁷ In other words, while statutory approbation would not automatically make the agreement legally binding, it could neutralise another bar to enforceability. In Canada, the impact of statutory approbation on an eventual application of the fettering rule is inconclusive. As we shall see, Canadian courts and arbitration tribunals have treated as legally binding agreements which clearly violated the rule against fettering.⁵⁸ In the first case, the agreement was not even ratified by legislation, but only by orders-in-council. In neither case was the rule against fettering actually mentioned.

Legislative assemblies must approve public expenditures whether engaged through an IGA or not.⁵⁹ However, such authorisation to spend does not have any effect on the legal character of the IGA itself. Legislation concerning appropriation is drafted in general terms: Parliament approves spending by programme, and will cover all contracts concluded in the context of such a programme. Furthermore, funds can always be voted subsequently in the case of an oversight. Consequently, lack of appropriation rarely occurs in practice and the courts are not generally very demanding regarding specific appropriations.⁶⁰

⁵⁵ Hence, in its 1994 *BC Railway* decision, discussed below, the Court did not even invoke this possibility, while in the *Railway Standardisation* case, also examined *infra*, this was not considered relevant. In both cases, agreements in dispute had been approved or ratified by legislation.

⁵⁶ This would transform it into a normative instrument *erga omnes* (with the force of a statute). As long as the statutory incorporation remains in place, the IGA would bind parties as they would bind citizens within their respective legal orders. The distinction is explored *infra*, 5.2.2.3.

⁵⁷ *Place Development Ltd. v. Commonwealth*, (1969), 121 CLR 353 (HCA; Windeyer J, diss.) 166, cited by BANKES (1991) 822, fn 142. In a 1977 decision involving a number of government agreements with private airlines, two judges suggested that parliamentary approval had this effect: *Ansett Transport Industries v. Commonwealth*, (1977) 139 CLR 54 (HCA) 61 and 113; WARNICK, Leigh, “State Agreements - The Legal Effect of Statutory Endorsement”, (1982) 4 *Australian Mining and Petroleum J.* 1-54, 25, BANKES (1991) 826.

⁵⁸ *Re Taxation Agreement Between the Government of Saskatchewan and the Government of Canada*, (1946) 1 WWR 257 [the *Tax Rental Agreement* case] and administrative law cases: *infra*, 4.1.3. See also *AG Canada v. Highbie*, [1945] SCR 385 (determination of Vancouver’s public harbours binding, even though embodied in orders-in-council only).

⁵⁹ HOGG and MONAHAN (2000) 220-223. This rule has been confirmed by statute: for instance: *Financial Administration Act*, RSC F-11.

⁶⁰ ARROWSMITH (1988) 53; *contra*: *Re Troops in Cape Breton*, [1930] SCR 554.

It will be recalled that in the *Troops Cape Breton Reference*, the Supreme Court of Canada denied that an undertaking by the Nova Scotia Minister of Justice to reimburse Ottawa for the cost of sending troops to the province bound the province. The ruling is based on a mixture of lack of authority to bind on the part of the Minister, and of lack of statutory authorisation for payment. Since then, however, the Supreme Court has ruled that the absence of budgetary appropriation does not affect the validity of a government contract, but rather the capacity of the other party to enforce it.⁶¹ If credits are voted later, the IGA can be enforced, assuming it is otherwise legally binding.⁶²

4.1.3 Assessing the case law relative to IGAs

It is against this background of potential limits to legal characterisation that the Canadian case law can be analysed. As we shall see, the binding character of IGAs *inter partes* has never actually been the direct object of judicial or arbitral decisions. More commonly, the possibility that IGAs may be binding, in the absence of any external norm conferring it this status, is admitted, *obiter*, or is simply taken for granted as the dispute focuses on another issue. In the absence of a direct enquiry as to the contractual character of IGAs, judicial reasoning on this issue is often opaque and a general trend is more difficult to discern than is suggested by the doctrinal analogy with government contracts.

Given the political and constitutional contexts in which legal problems relating to IGAs generally arise, the cases tend to be intricate. Technical aspects of private law - which is occasionally referred to as the applicable law, or simply applied - add another layer of complexity. It is also common for a number of judges to advance a variety of legal reasons for their rulings in the same decision, mixing private and public law reasoning. This comparative exercise does not allow for a detailed exposition of these subtleties. Despite the length of this section, what follows thus contains major simplifications. The intention behind the following survey is to extract either judicial pronouncements on the contractual character of IGAs, or judicial presumptions to that effect. This is particularly delicate since, in most cases, judges avoid calling into question the binding character of an IGA, regardless of its internal flaws, if the issue has not been argued before them.

⁶¹ *Verreault & Fils v. AG Québec*, [1977] 1 SCR 41, 47.

⁶² Note, that in the absence of the required appropriation, questions relative to the intention to create legal relations may be raised. While this has given rise to litigation in Australia, it is apparently not the case in Canada: *Australian Woollen Mills Pty Ltd. v. The Commonwealth*, (1954) 92 CLR 424; SEDDON, N.C., ELLINGHAUS, M.P., *Cheshire and Fifoot's Law of Contract*, 7th Australian ed. (Sydney: Butterworths, 1997) 207.

- **The 1883 British-Columbia Railway Agreement**

An agreement concluded in 1873 between B.C. and federal authorities has received a number of contradictory characterisations, with very little guidance as to applicable criteria. This agreement is intimately related to the 1871 B.C. Terms of Entry in which Ottawa undertook to build, within ten years of B.C. joining Canada, a rail link from the centre of the country to the coast of B.C., in exchange, notably to some land concessions. Delays on construction generated a lot of tension and some Parliamentarians were even calling for B.C. to withdraw from the federation.⁶³ A new constitutional settlement was reached in 1883.

It involved a federal-provincial agreement incorporated by parallel legislation, as well as a federal agreement concluded with a private railway consortium, and “ratified and confirmed” by a federal Act.⁶⁴ They were negotiated concurrently and signed on the same day. Neither was confirmed by British authorities, as were the 1871 original deal which they altered, or at least completed. The vertical IGA contained specific land grants made by B.C., while Ottawa agreed to invest \$750,000 for the construction of specific railway lines. For its part, the company agreed to “operate in good faith and continuously” particular lines.

These two 1883 agreements were heavily litigated and their status has given rise to a bewildering range of characterisations. Hence, in the late 19th century, two judges of the Supreme Court described the federal-provincial IGA as a “treaty” and as a “constitutional compact”, so that the 1883 land conveyance was assimilated to a transfer between independent Crowns. The Privy Council disagreed, and qualified the arrangement as a statutory arrangement embodying a “commercial transaction”.⁶⁵

A century later, in a dispute concerning the decision by Ottawa to close unprofitable railway lines subject to the companion 1883 agreement, the Supreme Court first denied that it had created obligations of a constitutional character. In the absence of Westminster involvement, the 1883 agreements could not have altered the 1871 deal. Any other solution would suggest that B.C. and Ottawa could have proceeded with a constitutional amendment by consent, circumventing the formal process.

While the Court admitted in passing that the deal between the private company and the federal government could qualify as a commercial arrangement, it offered yet a new reading on the 1883 federal-provincial agreement. On the one hand, it held that the land

⁶³ 1994 *BC Railway case*, par. 108.

⁶⁴ 1994 *BC Railway case*, par. 40.

⁶⁵ The “Precious Metal case”: *BC v. Canada* (1889), 14 AC 295, 304 (PC); rev’g (1887) 14 SCR 345, 357-358. The practical consequence was that in the first case, subsoil would have passed along with

conveyance had been made in implementation of the Terms of Entry, they were therefore of a constitutional character (in other words, the Court held that though more detailed, the 1883 did not add anything new to the Terms of Entry). This was not the case, however, of the financial commitments by Ottawa, which had not been contemplated in 1871. They could not be of a constitutional character since this would imply an amendment without Westminster. Without truly considering another possible legal characterisation, the Court simply described this part of the deal as “political”.⁶⁶ There is no suggestion that the agreement – which was qualified as a commercial transaction in 1889 – had contractual value.⁶⁷

In other words, the same IGA has been described as a treaty, a constitutional compact, a commercial deal and a political undertaking. The analysis in each case is convoluted and criteria are difficult to discern for each of those characterisation. In 1889, the Privy Council was concerned with establishing the deal as a “private” conveyance, as opposed to one between independent countries, not with distinguishing it from a non-legally binding agreement. In 1994, the Supreme Court obviously sought to distance itself from the undignified description of such a significant arrangement in the life of the federation as a mere “commercial undertaking”.⁶⁸ While the court of first instance had characterised the deal as constitutional, it nevertheless mentioned that the province had carried out its part of the deal which bound the federal government to carry out its own--typically contractual language. There is no such language in the Supreme Court’s decision. The issue is simply avoided.⁶⁹ Instead, the Court emphasises the importance of “political” agreements in the federal system.⁷⁰

The 1883 agreement, which spans over a century of judicial interest, illustrates the spectrum of possible characterisations of IGAs in Canada, all accomplished without much care for specific criteria. As the following cases will illustrate, there may be an evolution in Canada away from the consideration of IGAs as similar to private contracts, which the Privy Council decision epitomises, towards an approach less prone to characterising them as legal instrument. These developments are far from straight-forward, however.

the conveyance, as in an annexion. Characterised as a commercial deal, the transfer only cover surface rights. Gold had been found in the subsoil.

⁶⁶ 1994 BC Railway case, par. 112-113.

⁶⁷ In that 1994 decision, the Court does characterise the federal-railway company deal as contractual, however. Admittedly, the dispute did not specifically require the characterisation of the IGA and problems of prescriptions would likely have arisen.

⁶⁸ The Court below had described the Privy Council analysis as a “serious misapprehension of Canadian history”: *Canada v. AG for BC* (1991) 59 BCLR (2d) 280 (BCCA), 302.

⁶⁹ To its possible defence, the issue before the Court was whether constitutional obligations arose from the 1883 arrangement. It was not asked to characterise the agreement otherwise. The contractual question was apparently never argued.

- **Other pre-war IGAs**

Two other pre-war cases illustrate the predominant contractual approach to IGAs that the Privy Council had advocated in the *Precious Metal* case. In one, an IGA between Ontario and Ottawa was simply assumed to be binding, despite the fact that it clearly dealt with public law issues, such as obligations towards aboriginal peoples.⁷¹ In the second, the Supreme Court apparently endorsed the conclusion that an implied contract existed concerning the interest rate Ottawa owed regarding funds it held on behalf of Ontario.⁷²

It will also be recalled that in the 1930 *Reference concerning Troops in Cape Breton*,⁷³ the Supreme Court did not deny that a promise made in writing by a Minister that the province would reimburse federal authorities for the cost of sending troops to quash labour unrest in the province could be legally enforceable. The particular problem in that case was the lack of proper authorisation, or more likely the absence of parliamentary appropriation for the payment.

In other words, until the war, IGAs tended to be understood as binding contracts, despite the constitutional context in which they were concluded and despite the arguably public law nature of the undertakings they contained. No concern with anything resembling the rule against fettering of discretion is discernible.⁷⁴ Conveyance of land, interest rates and even the rental of army services were assimilated, without detailed analysis, to private law contracts.

- **The Tax Rental Agreements**

As a means of financing the war effort, a number of vertical agreements were concluded through which provinces “rented” their powers to collect personal and company income taxes to Ottawa, in exchange for financial compensation. In 1945, Ottawa refused to give Saskatchewan a particular instalment, arguing the latter owed it money under another

⁷⁰ Citing, *obiter*, federal-provincial Tax collection agreements as examples, but without providing any criteria for this characterisation : 1994 *BC Railway case*, par. 113.

⁷¹ In *Canada v. Ontario*, [1910] AC 637 (PC), aff. (1908), 42 SCR 1 [*Ojibway case*], a 1884 Ontario-Ottawa agreement, concluded in the wake of the attribution of lands to the province, affected promises made to Ojibway people.

⁷² *AG Ontario v. AG Canada*, (1907) 39 SCR 14, conf. (1906) 10 Ex CR 292 [the *Interest Rate case*]. An arbitral tribunal had confirmed that interest rate to be applied until the scission between Ontario and Québec was completed, which it assumed would be the case by 1896. By 1904, this issue was still unsettled and Ottawa decided to unilaterally reduce the rate of interest to 4%. The precise grounds of the decision are difficult to ascertain, but the Court apparently endorsed the contractual analysis of the court below.

⁷³ *Re Troops in Cape Breton*, [1930] SCR 554; *supra*, 4.1.2.1.

⁷⁴ The *Amphitrite* decision, rendered in 1921, predates these decisions. It is not invoked in the 1994 *BC Railway case*.

IGA.⁷⁵ The case was submitted to an arbitration tribunal, as provided in the Tax Rental Agreement.⁷⁶ Saskatchewan insisted that the two IGAs were distinct and could not be applied one against the other. This submission was rejected by two of the three arbitrators who applied the private law doctrine of set-off (*“compensation”*) to justify the latter’s withholding of funds.⁷⁷ Their reasoning is steeped in the common law of contracts. The majority actually relied on the Privy Council’s finding that the 1883 B.C.-Ottawa agreement was similar to a private deal, as opposed to a *jure regia* one.⁷⁸ In other words, they drew on an analogy between an agreement not to tax and a “commercial transaction”.

In a strong dissent, the constitutionalist Frank SCOTT focused on certain public law aspects of the case. First, he asserted that the Terms of Reference of the Tribunal excluded any consideration of IGAs other than the Tax Rental one. He maintained that set-off could not be used against a Crown unless provided by statute. Finally, although the IGA had only been authorised by statute rather than incorporated, he contented that Ottawa had a statutory –rather than contractual - duty to pay the installment to Saskatchewan pursuant to the Tax Rental Agreement.

He shied away, from denying any binding status to the IGA on grounds that it violated the distribution of powers, or fettered executive discretion. The IGA directed that any dispute be resolved by arbitration, and legal solutions were therefore sought. In an article published a few years later, however, he described these agreements as “gentlemen’s agreements”, without specifying why he thought them to be deprived of legal character.⁷⁹ In fact, in the 1994 *B.C. Railway* case, the majority of the Supreme Court briefly referred to the various tax collection agreements as “very stable political arrangements” even though lacking in constitutional status.⁸⁰ No consideration was given to the possibility of some intermediate legal character, such as contract.

⁷⁵ Pursuant to the “seed agreement”, Ottawa undertook to guarantee provincial borrowing to purchase seeds. The province had defaulted on the loans and Ottawa was re-claiming compensation for the guaranteed sums.

⁷⁶ *Re Taxation Agreement Between the Government of Saskatchewan and the Government of Canada*, (1946) 1 WWR 257 [the *Tax Rental Agreement* case].

⁷⁷ Set-off is the common law equivalent to compensation.

⁷⁸ That is, dealing with matters of the Crown, such as land conveyance following a Peace Treaty. In the context of the Tax Rental agreements, the reference to *jure regia* suggests governmental functions. PC in the Precious Metal case, 304, cited at 277 of *Tax Rental Agreement* case.

⁷⁹ SCOTT, Frank, “The Constitutional Background of Taxation Agreements” (1955-56) 2 *McGill LJ* 1, 5, adding that [...] even to a constitutional lawyer it would seem that gentlemen’s agreements ought to be carried out in a gentlemanly way, and that where strict law ends good faith must continue”.

⁸⁰ 1994 *BC Railway* case, par. 113, citing LAFOREST, Gérard V., *The Allocation of Taxing Power Under the Canadian Constitution* (Toronto: the Canadian Tax Foundation, 1967) 28. There is a technical difference between Tax Rental and Tax Collection agreements which need not retain us here: HOGG (1998) 143-145.

It is unlikely, indeed that a regular court of law could enforce agreements through which orders of government so clearly abdicate – even temporarily – the exercise of a constitutional prerogatives.⁸¹ *Ratione materiae* limitations would appear to deprive such IGAs of legally binding status *inter partes*. As it turned out, the case was submitted to an arbitration tribunal which applied legal principles to resolve the dispute, without having to formally decide on the legal character – or the validity – of the agreement. This suggests that the choice of forum for resolving a dispute is relevant to its characterisation, or at least to avoidance of certain hard issues concerning this characterisation.

- **The Railway Standardisation case: An Australian intrusion**

None of the cases discussed so far provide a substantial analysis of the legal character of IGAs. A 1962 Australian decision does.⁸² While it has never been applied in Canada,⁸³ the analysis it provides, so lacking in the Canadian case law, makes the case noteworthy.

In 1949, the Australian Government and South Australia concluded an IGA regarding the building of railroads and the standardization of railway gauges in the latter's territory. Each party was to undertake a portion of the project. In addition, the Commonwealth agreed to finance the works with the State agreeing to repay 30% upon completion. The agreements provided that further agreements on specific issues such as the timing of works would follow. Failure to agree on order and timing were to be resolved through government negotiations, and, failing that, by the federal Minister of Transport. The agreement was approved by respective statutes.

South Australia initiated an action against the Commonwealth for failing to carry out its portion of the work. The latter objected that the case did not raise any legal or justiciable question. The High Court agreed and the action was dismissed at a preliminary stage. None of the five judges who wrote concurring judgements found the IGA to be legally binding.

⁸¹ This is not to suggest that a court could not find some form of unjust enrichment, if Ottawa were to withhold collected taxes without compensating the province: *infra*, 4.4.

⁸² *The Railway Standardisation case*. This reference to Australia is not merely interesting from a comparative law perspective. As long as the Privy Council was the final Court of Appeal in Canada (1949), Commonwealth cases were not considered foreign law (the *Amphitrite* is a good example). The tradition of considering Australian case law has continued, although, as will be pointed out, care should be used in the context of IGAs.

⁸³ It was distinguished in two decisions relating to “constitutionalised agreements”: *PEI Ferry case*, 587; *Hogan v. AG Newfoundland*, (2000) 183 DLR 4th 225 (NFCA) 253. Note that in that last case, the Newfoundland Court of Appeal suggests - erroneously - that the High Court of Australia had denied that IGAs could be more than political instruments. The Railway Standardisation case is not mentioned in the *CAP Reference* or the *1994 BC Railway case*. It is mentioned in passing in the NS-NF arbitration, par. 3.8-3.9.

Objections drawn from the private law of contracts as well as public law are intertwined, although a clear majority founded their decision on *ratione materiae* limitations, sometimes hidden behind private law terminology.

Several judges recognised that an agreement between governments could give rise to obligations enforceable at law, when they are similar in nature to those that could arise between individuals. Dixon C.J. underlined, however, that:

“[I]t is one thing to find legislative authority for applying the law as between subject and subject to a cause concerning the rights and obligations of governments : it is another thing to say how and with what effect the principles of that law do apply in substance. *For the subject matters of private and public law are necessarily different.* What is in question here is an agreement assuming to affect matters *which are governmental* and *by nature* are subject to considerations to which private law is not directed. That is particularly true of financial provisions, the fulfilment of which in constitutional theory at least must be subject to parliamentary control.”⁸⁴

For Windeyer J., the IGA was of the “sort that are outside the realm of contracts altogether”, as is often the case of “political” promises by governments to their citizens or to other citizens which are “not enforceable by processes of law”. In other words, the Court generally considered the plans to construct railways as matters of governmental policy, requiring further executive and parliamentary action. The promises contained in the agreements are therefore of a “political” character.

For Windeyer J. “(a)n agreement deliberately entered into and by which both parties intend themselves to be bound may yet not be an agreement that the courts will enforce”.⁸⁵ Then, as if to expiate this deviation from the sanctity of the parties’ intention, he adds “(t)he circumstances may show that they did not, or cannot be regarded as having intended, to subject their agreements to the adjudication of the courts”. In other words, courts may simply wish to leave certain matters outside the Court house, as a matter of judicial policy, rather than as a reflection of the parties’ actual intentions (but they may seek to hide these considerations behind a constructed intention). Along the same lines, for McTiernan J.:

“ [T]he real basis of [South Australia’s argument] can be summed up in the “*Pacta sunt servanda*”. A two-sided act such as an agreement between the Commonwealth and a State could be a contract and produce obligations binding on both of them according to its tenor. But the point to be decided in this case is whether or not the intention of

⁸⁴ *Railway Standardization case*, 140, per Dixon CJ, emphasis added.

⁸⁵ Citing (at 153-154) *Balfour v. Balfour*, [1919] 2 KB 571, 579. Interestingly, after noting that IGAs that share characteristics with agreements concluded by private parties could be legally binding, the judge relied on a case where a court refused to enforce a “private” agreement between husband and wife.

either agreement is to create obligations enforceable in a court [...] I cannot think that in entering into these agreements the parties contemplated that they were entering into obligations cognizable in a court of law.”⁸⁶

Several judges underlined the fact that failure to agree on timing and order of works was to be resolved by agreement through political negotiations. Hope that failure to agree between governments may be resolved by agreements between Ministers is oddly optimistic. Such clauses do not necessarily oust judicial intervention, however.⁸⁷ In any event, this is not how the High Court interpreted the clauses.

Finally, the IGA was found to be inchoate: it lacked specificity and amounted to an agreement to make further agreements. In my view, this is the most convincing obstacle to the legally binding character of that particular IGA. This is not, however, the reason of the case’s reputation, notably in Canada.

With little or no analysis, the Court rejected the submission legislative approval rendered the Agreement binding on the parties. Hence, for Windeyer J., the question is whether the agreement “without more, create contractual rights and duties”.⁸⁸ Apparently, the approving legislation did not amount to the required “something more”, which could transform the political commitment into a legal obligation.

Three of the judges noted that even without being formally binding, the agreement could give rise to legal obligations, if it had been relied upon or partly performed by one party.⁸⁹ As it was, South Australia had not carried out works for which it was seeking financial compensation, but was awaiting federal investment.

For the High Court, legally binding agreements between federal partners are not excluded but would require very clear indications that the parties intend to be bound at law, and might be restricted to fields in which a parallel with contract between private parties can be drawn. In other words, in this decision, the exception *ratione materiae* outlined earlier, are determinative, notably something which looks like the rule against fettering of discretion, although the expression is not actually used. And, as we saw, the statutory ratification of the IGA was deemed inconsequential to the status of the IGA *inter partes*. The contrast with the Tax Rental Agreements could not be greater.

⁸⁶ *Railway Standardisation case*, 148-149.

⁸⁷ *Secunda Marine Services Ltd v. Canada*, 2003 NSSC 2 (canlii).

⁸⁸ *Railway Standardisation case*, 152. Along same line: 143, 150 and 155.

⁸⁹ On detrimental reliance, estoppel etc. : *infra*, sections 4.4.2.3 and 4.5.

The *Railway Standardisation* case has put a damper on the understanding that IGAs can create binding obligations between federal partners, beyond what the facts and the ruling actually warrant. Yet, its general message, that IGAs are essentially political until proven otherwise, and only if they contain undertakings of a “private character”, seems to exert a certain influence on more recent thinking concerning the status of IGAs in Canada, even when the case is not actually referred to.⁹⁰ This influence is of course difficult to demonstrate in the absence of direct reference to the case.⁹¹ But it is similar to the influence the *Amphitrite* decision concerning the fettering of discretion. The case is never applied, but the principle it embodies remains in the background of analysis of IGAs. As the following demonstrates, however, the idea that IGAs are political until proven otherwise, and mostly unless they can be compared to private law arrangements, is not consistently held in judicial circles in Canada.

• The *Lofstrom* and *Finlay* decisions

The contractual character of IGAs is sometimes implicit in decisions denying third party rights on grounds that bear close resemblance to privity of contracts.⁹² This, of course, reinforces the contractual model through which IGAs are analysed. For instance, in 1971, a citizen argued that Saskatchewan authorities were violating the *Canada Assistance Plan* (“the CAP”), a federal-provincial scheme involving an IGA, pursuant to which federal authorities conditionally reimbursed half the cost of certain provincial health and social services.⁹³ This case mainly raises hierarchy of norms issues, notably the relation between unilateral regulations and an IGA.⁹⁴ It is nevertheless of interest because of the Court’s understanding that any violation of the CAP “would be a matter entirely between the Governments, affecting only the respective obligations and rights under the agreement.”⁹⁵ The Court did not analyse the status of the CAP agreement *per se*. However, its statement reveals a contractual understanding of the instrument, at least when its implementation is challenged by third parties. To put it bluntly, contractual analysis is useful to deprive citizens of a voice in intergovernmental affairs.

⁹⁰ For ex. 1994 *BC Railway case*.

⁹¹ As was mentioned above, it was distinguished in two cases dealing with constitutionalised agreements (*PEI Ferry case* and *Hogan*). It was, however, referred to in the NS-NF arbitration, although this was not essential for disposing of the issue.

⁹² The privity of contract is the common law equivalent of the relativity of contract in the civil law.

⁹³ *Re Lofstrom and Murphy et al.*, (1971) 22 DLR (3d) 120 (SKCA). See also the third party analysis in the 1908 *Objibway case*, in which on the one hand the interests of aboriginals were considered foreign to the 1894 Ottawa-Ontario agreement, while Ontario was also deemed foreign to the original 1873 *Objibway-Ottawa* agreement. In other words, those cases endorse a traditional privity of contract approach.

⁹⁴ *Infra*, 6.2.3.

⁹⁵ *Re Lofstrom*, 122.

Such a narrow understanding of the impact of IGAs on third parties has gradually been set aside through an expansion of “public interest standing” to challenge the implementation of IGAs in the first *Finlay* decision.⁹⁶ With this solution, the Supreme Court implicitly admitted that government parties to an IGA were unlikely to challenge in court the way in which each of them was interpreting the arrangement. While this is not articulated very clearly, this evolution signals an indirect recognition of the inadequacy of conceiving IGAs as purely contractual instruments, at least when third parties are involved. The next case, however, illustrates that when a case is not brought before courts by third parties, the classic contractual approach persists.

- **The Canada-Alberta agreement of 1973**

Indeed, in 1973, Alberta and Canada concluded an IGA through which the latter transferred an irrigation project to the former.⁹⁷ The IGA provided that any dispute that could not be settled by Ministers would be submitted to the Federal Court. A dispute arose concerning the scope of the transfer. In a brief decision, that Court analysed the terms of the IGA as a contract. It held its terms to be clear and ruled that the minerals were transferred along with the surface rights. The Court admitted that an IGA was a means of transferring property between orders of government.⁹⁸ It did not raise any doubts about the binding character of the IGA. It did not draw any explicit analogies with private conveyances, nor did it broach the “*jure regia*” question that had been at the center of the *Precious Metal* case a century earlier.⁹⁹ The Court’s only statement on the issue of status relates to the fact that the IGA was binding on every federal Department, including those which had not taken parts in the negotiations.¹⁰⁰ The ruling is concise, resolves the disputes, and simply assumes the contractual character of the agreement it is asked to interpret.

⁹⁶ *Finlay v. Canada (Minister of Finance)*, [1986] 2 SCR 607. This is part of a string of decisions: *infra*, 6.2.4.

⁹⁷ Canada had previously purchased this land from private parties: *Re Interpretation of a Certain Agreement Entered into between Canada and Alberta on March 29, 1973*, [1983] 1 FC 567 (TD).

⁹⁸ It is unclear whether this supports or counters earlier rulings where the transfer of property was effected through parallel orders-in-council (*AG Canada v. Higbie*, [1945] SCR 385; *Sunday v. St-Lawrence Seaway Authority*, [1977] 2 FC 3 (TD); *Re Arising out of the Transfer of the Natural Resources to the Province of Saskatchewan*, [1931] SCR 262). The 1983 decision does not refer to these cases, and does not even mention orders-in-council which may have been passed to endorse the Agreement. The latter is truly analysed as a stand-alone contract.

⁹⁹ The solution is distinct from the *Precious Metal* case, because of the very terms of the IGA.

¹⁰⁰ The case leaves the impression that the Court challenge was aimed at resolving an internal dispute in the federal administration at least as much as to the resolution of a federal-provincial one.

- **The Canada Assistance Plan Reference**

The 1991 *Canada Assistance Plan Reference* turned on the federal Executive's ability to introduce a bill into Parliament that had the effect of countering a long-standing cooperative scheme comprised of IGAs, as well as federal and provincial Acts and regulations. The case mostly raises issues of hierarchy of norms and is discussed in detail in Chapter 6. It is invoked here however, because Canadian policy makers, and sometimes courts refer to it to deny the legally binding character of IGAs, as opposed to their vulnerability to contrary legislative action.¹⁰¹ As with the *Australian Railway* case, the scope of the Supreme Court's opinion is often exaggerated. It does, however, suggest an unease with the simplistic contractual analysis of IGAs.

Before the BC Court of Appeal, the federal government had conceded that it could only limit its obligations under the federal-provincial arrangement through legislation.¹⁰² It did not pursue its original argument that it could unilaterally modify its obligations on the basis of the prerogative or of principles of government contracts. If it wanted out of its obligations, the executive had to enrol Parliament. This was an admission that it was bound by the IGA. In its advisory opinion, the Supreme Court did not squarely deal with the legal status of the IGA *inter partes*. The resolution of the case did not require it. The Court nevertheless curtly dismissed the submission that the IGA was "enforceable as a private law agreement [...] subject to the applicable constitutional principle", adding that IGAs are not "ordinary contracts".¹⁰³ For the Court, the only principle at play was that of parliamentary sovereignty.¹⁰⁴

It did not explore whether IGAs could be enforceable otherwise than by a narrow analogy with a private law arrangement. The Court denied that IGAs could limit the sovereignty of legislative assemblies to adopt norms which contradict them. This obviously renders IGAs somewhat fragile, but no more than other forms of government contract. Yet, while made in passing, these statements that IGAs are no "ordinary contract" seem to deviate from the contractual interpretation implicitly endorsed in the previous case law. This attitude is somewhat comforted by the finding, three years later, that financial undertakings in the 1883 BC-Ottawa agreement was of a "political" character.¹⁰⁵ The statements are made *obiter*, but leave an impression that the Court is reluctant to admit the legally binding character of IGAs *inter partes*. It may, but this is still a matter of speculation, share the Australian High Court's position that IGAs are political until proven otherwise.

¹⁰¹ For ex.: *Ontario (Chicken Producer's Marketing Board) v. Canada (Chicken Marketing Agency)*, [1993] 1 FC 116 (FCTD) par. 27.

¹⁰² *Re Canada Assistance Plan*, (1990) 46 BCLR (2d) 273 (BCCA) 287.

¹⁰³ *CAP Reference*, 553-54.

¹⁰⁴ This is examined in detail *infra*, 6.2.2.2.

- **The Alameda Dam decision**

At issue in this case was an agreement pursuant to which the federal government agreed to give one million dollars per month to a Saskatchewan Crown corporation, acting explicitly as an “agent of the Crown”, in exchange for a temporary suspension of works on a major dam project to allow the federal Minister of the Environment to implement recommendations made by an environmental panel.¹⁰⁶ Frustrated with the delays concerning this implementation, the provincial Premier announced that the project would proceed. The federal government sought an injunction to enforce the agreement. While the other party was a Crown corporation, its actions were obviously controlled by the executive.

The Saskatchewan Court of Appeal did not characterise the agreement *per se*, but reproduced it in full. It contains clear obligations and typical common law contractual terminology such as “in consideration of [...] ceasing construction [...] the minister agrees to the payment of one million [...]”. The Court rejected the provincial submission that the agreement was not binding because it lacked specific governmental approval by order-in-council as required under the federal *Department of the Environment Act*.¹⁰⁷ The Court was obviously incensed at the attempt to deny legal character to an agreement through which the Corporation had already received over 8 million dollars.¹⁰⁸ In other words, public law impediments (both in terms of authority and potential *ratione materiae limitations*) were set aside.¹⁰⁹ The injunction was granted, which suggests that without saying it, the Court concluded the agreement to be binding.¹¹⁰

- **The Contravention Act case**

In the late 1990s, the federal government mandated consenting provinces with the issuance of contraventions and prosecution of violations of certain federal Acts. In exchange, the provinces are entitled to part of the fines collected. The validity and constitutionality of the arrangement was challenged, on grounds that it violated quasi-constitutional language rights. This issue is explored in Chapter 6.

There is one point of interest for our purposes, however. The IGA that clearly governed the parties’ behaviour was unsigned. The two governments explained they had

¹⁰⁵ The 1994 *BC Railway case*, par. 112.

¹⁰⁶ *Canada v. Saskatchewan Water Corp.*, [1992] 4 WWR 712 (SKCA) [the “Alameda Dam” case]; KENNETT (1993) 655-656.

¹⁰⁷ RSC 1985, ch. E-10. The Court denied the dam was a “programme” for which cabinet approval was required.

¹⁰⁸ Regardless of the fact that the money received covered past delays...

¹⁰⁹ Apparently, no argument based on the rule against fettering was raised.

wanted to test-drive the arrangement prior to formally endorsing it. The Federal Court was clearly puzzled by the status of the IGA, which it described it as an “oral” or a “draft” agreement.¹¹¹ Without directly ruling on its legal character, the Court concluded that the IGA would become void, if it were not amended within a year to take minority language rights into consideration. The Court was unwilling to denying any value to an agreement that parties were relying upon, and that clearly affected third parties.

- **The Nova-Scotia and Newfoundland Maritime boundary arbitration**

In 2000, an arbitration tribunal was set up to resolve a long-standing dispute regarding the line that divides respective offshore of Nova Scotia and Newfoundland. In the first Phase, the tribunal had to determine whether the provinces had previously concluded a binding agreement concerning this boundary.¹¹² If this was not the case, the tribunal was to draw the boundary in a second phase. It did so, having concluded that no formal binding agreement had been reached by the provinces on the issue.¹¹³ The award is significant, for it contains a review of criteria for the existence of a binding agreement between federal partners. Interestingly, however, the tribunal was directed to apply – by analogy – rules of public international law, with necessary modifications.¹¹⁴

In arguing that the line had previously been agreed upon, Nova Scotia relied on a 1964 joint statement and a 1972 *Communiqué*, as well as subsequent practice by the two provinces. Newfoundland principally argued that no such agreement had ever been reached since any proposal was always understood to require the concurrence of the federal government, who, in the end, has the constitutional power to set the boundary.¹¹⁵

For the tribunal, the essential question was whether the Premiers who issued the 1964 and 1972 statements “intended to make an immediate good faith commitment as to

¹¹⁰ Whether an action in restitution (unjust enrichment) could have succeeded in uncertain since the work was suspended for a number of months, for which payment was provided.

¹¹¹ *Commissioner of Official Languages v. Canada (Department of Justice)*, FCTD, T-2170-98, 23.03.2001.

¹¹² NS-NF arbitration; unless otherwise indicated, reference is to first phase.

¹¹³ Second Phase 26.03.2002 : www.boundary-dispute.ca.

¹¹⁴ This direction was found both in the two federal Acts implementing offshore Agreements with Nova-Scotia and Newfoundland, as well as in the Terms of Reference. While the Supreme Court has suggested the analogy with the way in which international treaties are incorporated into domestic law (*Anti-Inflation Reference*, *infra*, 5.2.2.3), the application of international law to resolve disputes concerning agreements had been rejected before: *Tax Rental Agreement* arbitration: SCOTT, diss. (at 282). The majority waltzed between private and public law, but did not consider public international law as a potential solution. Similarly, in *Canada v. Ontario*, [1910] AC 637 (PC), the Privy Council refused to use rules of public international law as applicable law to an intergovernmental dispute; MOORE (1935) 191-193.

¹¹⁵ The offshore is federal territory: *Re Newfoundland Continental Shelf*, [1984] SCR 86; *Re Offshore Mineral Rights of B.C.*, [1967] SCR 762. The practical interest of drawing this boundary flows notably

their respective boundaries”.¹¹⁶ This, it noted, was a question of fact, which would arise in similar terms whether the issue was examined from the angle of domestic or public international law.¹¹⁷

Reviewing relevant decisions of the International Court of Justice, the tribunal noted that informal instrument could constitute binding agreements, including unsigned communiqués, and minutes of meetings.¹¹⁸ The status of an agreement required an evaluation of its “actual terms”, the circumstances in which it was drawn up and the potential dependence of some external condition or procedure. Signature and language used are also relevant. Mostly, what is determinative is whether there is a shared understanding that the agreement “is to be embodied in some later formal document or is to be subject to some subsequent process of implementation in order to become binding”.¹¹⁹

Turning its attention to Canadian public law, the tribunal stated that executives cannot conclude binding agreements concerning matters requiring legislative action.¹²⁰ It also invoked the rule against fettering executive action, without, however, specifying how this could have precluded the conclusion of an agreement in this particular case.¹²¹ Subject matter limitations were obviously not the arbitrator’s main concerns. The decision hinges on the understood need for further federal action for any agreement to be binding.¹²² Here, not only was subsequent legislative action essential, but *federal* legislation was required for any boundary to be effective. Until this was secured, the tribunal reasoned that provinces could not have intended to make a final and binding agreement.

The Tribunal analysed the parties’ subsequent practice including meetings, letters, parallel agreements and negotiations with other provinces. While relevant, this practice was of a limited probative value, since it can be explained by a number of factors. Particularly telling, however, was the fact that none of the participants ever referred to the 1964 text as

from other IGAs pursuant to which the federal government agrees to co-manage the area with the respective provinces, and, more significantly, to share resource revenues with them.

¹¹⁶ NS-NF arbitration, par. 3.29. While the “intention” criteria is recurrent throughout the award, the tribunal nevertheless admits, in a footnote, that “[i]nternational law applies to the relations of states irrespective of their intent, and [that] it is sufficient for a treaty that the Parties entered into immediate commitments which were to be fulfilled in good faith”: fn 45.

¹¹⁷ NS-NF arbitration, par. 3.28.

¹¹⁸ *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, [1978] ICJ Rep 3 (par. 96); *Case concerning Maritime Delimitation and Territorial Questions (Qatar v. Bahrain) (Jurisdiction)*, [1994] ICJ Rep.112, paras. 22-41, discussed at par. 3.16-3.20 of arbitration.

¹¹⁹ NS-NF arbitration, par. 3.18.

¹²⁰ Referring to *BC v. Esquimalt and Nanaimo Railway Co.*, [1950] AC 87 (PC) and the *CAP Reference*.

¹²¹ At par. 3.8, the tribunal cites the *Amphitrite*, the *Commissioner of Land v. Page*, as well as the Perry decisions: *infra*, 4.1.2.2.

¹²² Par. 7.2-7.3. The Court notably assimilated the impact of this external requirement with treaties subject to ratification that has not yet been obtained: par. 3.13.

being binding, or protested when it was not respected.¹²³ Finally, the tribunal also observed that on certain key issues, the boundary discussed in the 1964 statement lacked the precision that would be expected of a final agreement.

In the end, the tribunal held that the terms of the 1964 Joint statement were “more consistent with a political, provisional or tentative agreement, which may lead to a formal agreement but which it not itself that agreement”.¹²⁴

This decision is of interest for a number of reasons. First, as mentioned, it provides a more detailed approach to the characterisation of IGAs than any other Canadian case. Second, the tribunal was directed to apply international law by analogy. This made sense, given that the dispute related to a maritime boundary, a matter over which international courts and tribunals have developed an expertise and methodology. The choice of law could also reflect the lack of clear criteria relating to IGAs in the Canadian legal literature. Third, the tribunal nevertheless insisted on the fact that the findings would have been the same had domestic law applied (whatever this may be). This suggests that the indicia used in public international law to determine whether States have reached a binding agreement are either transposable or identical to those which would apply to IGAs.

Fourth, the tribunal made a laconic reference to the rule against fettering, cited both the *Amphitrite* and the *Railway Standardisation* cases, without specifying how this could have been relevant to the existence of an agreement.¹²⁵ The inference is clearly that there may have been a *ratione materiae* limitation to this type of agreement, anyhow. In other words, what may have been suggested is that in Canadian domestic law (by contrast to international law, though the tribunal never says so), an agreement concerning a border can only ever be of a non-legal character.¹²⁶ Unfortunately, by not detailing these limitations, the award may give the impression that there are more obstacles to the legally binding character of IGAs than is warranted.

¹²³ NS-NF arbitration, par. 7.6.

¹²⁴ NS-NF arbitration, par. 7.3.

¹²⁵ The reference to those foreign cases is worth mentioning because they are so rarely invoked in Canada, as was seen earlier.

¹²⁶ This would make sense, given s.43a, *Constitution Act, 1982*, which subjects alteration of inter-provincial borders to constitutional amendment. Of course, here, the boundary is not truly inter-provincial. It is more “administrative”, drawn for purposes of a federal-provincial scheme. The reasoning is nevertheless apposite.

- **Administrative law cases**

With the previous exception, the status of IGAs as contractual instruments has hardly been confronted head-on in Canada. It must often be inferred from rulings which are directed at other issues. This is notably the case of administrative law cases in which third parties either challenge the ways in which IGAs are concluded, or are implemented.

Hence, in a number of cases, agricultural producers challenged the imposition of quotas determined through federal provincial agreements, combined with legislative and regulatory measures. Courts almost invariably uphold such cooperative schemes and their application to third parties.¹²⁷ Hence, the Superior Court of Québec recently recognised that the province had renounced to exercise certain of its constitutional powers, “in a spirit of collaboration” so as to harmonise the commercialisation of chicken production across Canada. It then asserted that the government “does not have the right to derogate from the agreement it has concluded”.¹²⁸ In other words, the Court assumed the province to be bound by the agreement, even though it was clearly “fettering” its constitutional powers through the cooperative scheme. This potential legal obstacle is not even invoked.

In another case, an interest group sought a declaration that IGAs on environmental assessment were of no force and effect, because through them the federal Environment Minister was “fettering” her statutory authority.¹²⁹ In certain clauses of the IGA, the federal government had agreed to limit the exercise of its own competences in favour of the provinces, so as to avoid duplication in environmental assessments. The Court carefully scrutinised the wording of the IGAs. It ruled that the general nature of the undertakings, and the fact that they all provided for further implementation agreements, precluded a conclusion that a “fettering of discretion” had actually taken place. In other words, the IGAs were inchoate.¹³⁰ While the Court does not explicitly characterise the IGAs, their lack of specificity would apparently leave them on the political side of the threshold. Paradoxically, if undertakings contained in the IGAs had been sufficiently precise to ground a conclusion that they created legal obligations for the signatories, they could have been held to violate the rule against the fettering of discretion.

Neither decision contains a careful characterisation of IGAs as contractual instruments. They exemplify, however, judicial tolerance for complex intergovernmental

¹²⁷ *Fédération des producteurs de volailles du Québec v. Monette*, 505-05-002793-963 (20.02.1997) (SCQ); *Fédération des producteurs de volailles du Québec v. Pelland*, 705-05-004614-007 (01.11.2001) (SCQ): *Infra*, s.5.3.2.

¹²⁸ *Pelland*, par. 90 (my translation).

¹²⁹ Pursuant to the *Environmental Protection Act*; SC 1999, ch.33: *Canadian Environmental Law Association v. Minister of the Environment*, FCTD, T-337-98 [*the CELA decision*]. These IGAs were discussed *supra*: 3.1.1.2.

¹³⁰ As the IGA in the *Railway Standardisation case*, to which the decision does not, however, refer.

schemes.¹³¹ When the issue of contractual character of an IGA is not directly challenged by government parties, courts are not likely to doubt their legal character.

4.1.4 Summary conclusions

Inferring general principles from this sparse case law – rendered over a century - is a perilous exercise. The rulings are clearly fact-dependent, often appear result-oriented, and - with the exception of the *Railway Standardisation case* and the Nova-Scotia Newfoundland arbitration - rarely deal with the issue directly. The following lessons may nevertheless be risked.

First, Canadian courts have obviously endorsed a contractual conception of IGAs and enforced them, or implicitly found them to be binding as such, i.e. when they covered a matter capable of being regulated by contract and when an intention to create legal relations could be discerned. This was notably the case in the late 19th century and early part of the 20th. But not exclusively. In the first *Anti-Inflation Reference* of 1976 the Supreme Court recognised, *obiter*, that an IGA could bind executives. And the Federal Court clearly interpreted an Alberta-Ottawa agreement as a contract in 1983.

Secondly, agreements that can be assimilated to private contracts appear more likely to be qualified as legally binding IGAs. This has sometimes led to stretched interpretations.¹³² However, when the binding status of the agreement is not challenged by one of the parties, this criterion seems to carry far less weight. In other words, when the status of IGAs lies in the background of a case that turns on other legal issues, courts are very tolerant of IGAs, even those which clearly curb governmental discretion.

Thirdly, when called upon by government parties to interpret an IGA, arbitration tribunals or the Federal Court as an arbitrator¹³³ generally do not concern themselves with public law impediments to the binding character of IGAs.¹³⁴ The *Tax Rental Agreement* sentence is a good illustration. In other words, when parties submit their dispute to outside arbitrators, and do not raise the lack of binding character of an IGA, the fact that it may violate the formal distribution of competences, or the rule against the fettering of executive action, will not be addressed. This confers a binding character on an IGA which a more classic contractual analysis would be less likely to recognise. At least, it obviates the need to

¹³¹ See also, *infra*, 5.3.2.

¹³² The Privy Council's description of the 1883 B.C.-Ottawa IGA as a "commercial transaction" for instance.

¹³³ Pursuant to s.19 of the *Federal Court Act*, RSC, 1985, ch. F-7.

¹³⁴ Although the situation could be different when the tribunal must determine whether an agreement actually exists: NS-NF arbitration, par. 3.7.

resolve the issue as squarely as the Australian High Court had to do in the *Railway Standardisation* case.

In fact, and this is the fourth lesson, although that decision of the Australian High Court is invoked in the analysis of IGAs, it has never actually been applied in Canada. Speaking about government contracts in general, ARROWSMITH warns that Australian case law ought to be considered with care.¹³⁵ For instance, Australian authors suggest that the intention to enter binding agreements may be more difficult to demonstrate in the case of government action,¹³⁶ while the Supreme Court of Canada has rejected the application of a distinct test for contracts by public entities.¹³⁷ It is thus arguable that Australian courts are more reluctant to qualify government contracts in general, and by extension IGAs in particular, as legally binding, than is the case of their Canadian counterparts.¹³⁸

Fifthly, however, the underlying analysis of the Australian High Court may explain statements made by the Supreme Court in the 1991 *CAP Reference* and the 1994 *BC Railway* decision. In the first, the analogy of IGAs with private contract was curtly dismissed, while in the second the segment of a federal-provincial agreement that had been debunked as a constitutional instrument was qualified as “political”. These assertions could be dismissed as *obiter dicta*, waiting for yet another finessed judicial re-interpretation. Yet, they possibly reveal a discomfort with the traditional conception of IGAs as contracts. Whether this is because of the nature of transactions between governments, or because of the impact on third parties which the contractual approach minimises, is difficult to assess.

Sixthly, the fact that an IGA has been authorised, approved or ratified by a statute does not seem to consolidate its status *inter partes*. As we shall see, the situation is different when an IGA is actually incorporated (along the same lines as international obligations). This confers a binding character *erga omnes* to an IGA, which by necessary implication also binds the executives. But simple parliamentary approval does not have that effect and has not even been interpreted as tending to show an intention to enter into a legal relationship.

Finally, part performance by one party could lead to the conclusion that an IGA exists, and is of a legal character (this was the case in the *Alameda*, but not in the 1883 *B.C. Railway* case). The parties’ subsequent practice, particularly their reference to an IGA as

¹³⁵ ARROWSMITH (1988) 15 ff.

¹³⁶ ARONSON, M., WHITMORE, H., *Public Torts and Contracts*, 1982 (Australia) at 204-05, cited by ARROWSMITH (1998) 15.

¹³⁷ *R. v. CAE Industries Ltd*, [1986] 1 FC 129 (CA) leave to appeal refused (1986), 20 DLR (4th) 347n (SCC).

¹³⁸ While in the *CAP Reference*, the Supreme Court endorsed another Australian ruling *West Lakes Ltd. v. South Australia* (1980), 25 SASR 389. That case dealt with the invalidity of agreements to

binding, would likely be an influential factor in its characterisation (the *Contravention* case, the *NS-NF* arbitration). Other criteria would include language, signature, the degree of specificity of undertakings, or required external conditions (the *NS-NF* arbitration).

Decision-makers often dismiss IGAs as political gentlemen's agreements.¹³⁹ Relatively recent *obiter dicta* by the Supreme Court of Canada suggest a presumption that IGAs remain on the political side of the threshold until proven otherwise. It is unclear, however, that this is how the courts in general treat IGAs. At it is, the Canadian case law fluctuates between uneasy analogies with the private law of contracts, inconsistent recourse to public law impediments borrowed from the law of government contracts and a benevolent tolerance (or voluntary blindness) regarding instruments which occasionally violate rules of public law, but which play such a central role in the functioning of the federation.

4.2 The characterisation of IGAs as contractual instruments in Belgium

The previous section illustrated how the conception of IGAs in Canada oscillates between binding contract and political instrument.¹⁴⁰ In Belgium, very little attention has been paid to the contractual aspect of cooperation agreements. The instrument was introduced in relative haste, in the heat of constitutional negotiations on the regionalisation of certain competences.¹⁴¹ There had not been a great deal of reflection on the status those agreements would enjoy. Since the insertion of s.92*bis* in the 1980 DMA in 1988-89, a number of cases and opinions of the legislative section of the Council of State (CSLS) have been rendered on questions related to those agreements (constitutionality, failure to respect some formalities), but apparently only one which indirectly broaches the character *inter partes*.¹⁴² Similarly, after limited academic interest for the question in the early 90s, which is briefly explored below, the literature has not addressed that question either. The main concern remains the place they occupy in the hierarchy of norms (could they be defeated by unilateral norms?).¹⁴³

This section explores the contractual dimension of cooperation agreements: that is, their status between the governments who concluded them. It is divided in four parts. The first considers certain analogies with other forms of contractual arrangements that have been considered or rejected by constitutionalists (4.2.1). The potential impact of the legislative framework on the characterisation of IGAs *inter partes* is then examined, notably by

legislate, not with the contractual value of IGAs in general. The *NS-NF Arbitration* (par. 3.17) also referred to the *Railway Standardisation Case*.

¹³⁹ Interviews conducted.

¹⁴⁰ Setting aside the particular case of "constitutionalised" agreements.

¹⁴¹ *Supra*, 2.2.3.1.

¹⁴² CSAS 115.975 (17.02.2003) (*Monfils*); *infra*, 4.2.4.

¹⁴³ *Infra*, Chapter 6.

considering the pre-1988 situation which it was meant to correct, as well as the particular dispute resolution mechanism introduced concurrently with s.92*bis* (4.2.2). A number of possible public law impediments to the contractual characterisation of IGAs are evaluated (4.2.3) before the very limited case law having some bearing on the contractual character of IGAs since the inception of s.92*bis* is surveyed. Finally, summary conclusions are proposed (4.2.4).

4.2.1 Analogies with other forms of consensual agreements

In the early days following the adoption of s.92*bis*, before the development of any substantial practice, a number of public lawyers attempted to demystify this new type of instrument.¹⁴⁴ Some analogies were suggested. Hence, COENRAETS referred to the civil law to suggest rules applicable to the capacity, formation and performance of agreements.¹⁴⁵ This was done in a rather abstract manner, noting that the consensualism of civil law contracts implied that in theory cooperation agreements could even be oral.¹⁴⁶ Others have assimilated them to “domestic treaties”.¹⁴⁷ KLEIN describes them as “half-way between contracts and treaties”.¹⁴⁸ Both of these sources, of course, reinforce the formal equality of parties, while the former strengthens the conception of federal partners as sovereign in their sphere of competences.

Given the Canadian analysis of IGAs as a sub-category of government contracts, the absence of rapprochement with contracts of the administration in Belgium, is particularly puzzling. The only author who mentions the possible analogy, dismisses it without further analysis.¹⁴⁹ Academics interviewed instinctively rejected the analogy also, largely because of the association of government contracts with the inherent inequality of parties.¹⁵⁰ For while Belgium does not have a distinct institution of “*contrat administratif*” along the French model,¹⁵¹ public authorities nevertheless enjoy a number of privileges, notably the power of unilaterally modifying the conditions of an administrative contract or even revoke it, subject to

¹⁴⁴ In fact, most of the articles on cooperation agreements were written between 1990 and 1992. UYTENDAELE's early analysis is largely reproduced in his most recent work.

¹⁴⁵ COENRAETS (1992) 162-168.

¹⁴⁶ This is peculiar, given this author's assertion that IGAs have, at a minimum, the force of regulations: COENRAETS (1992) 165.

¹⁴⁷ MOERENHOUT and SMET (1994) 145-146; UYTENDAELE and COENRAETS and UYTENDAELE (1991) 15; DELPÉREE and DEPRÉ (1998) 313, fn1, questioned the analogy, without clearly taking position.

¹⁴⁸ KLEIN (1990) 2.

¹⁴⁹ ERGEC (1987) 349.

¹⁵⁰ MAST, André, ALEN, André, DUJARDIN, Jean, *Précis de droit administratif belge* (Brussels: Story-Scientia, 1989) 110-112 [MAST].

¹⁵¹ Those contracts are subject to the civil law and enforced by ordinary courts, not the Council of State, with the exception of of “*actes détachables*”, that is administrative decisions related to a contract (such as the choice of co-party), which can be challenged before the administrative court: LAGASSE, Dominique, “La théorie des actes détachables est-elle dans une impasse? Les actes de

compensation.¹⁵² In other words, the Belgian law of government contracts is a hybrid: close to French law in terms of substance, and to the common law conception of the rule of law (including the notion that governments should be subject to the same legal proceedings as private citizens) in terms of procedure. The substantive rules rest on a clear vision of the inequality of the parties, an inequality that is openly admitted.

The possibility that IGAs could constitute – as in Canada – a sub-category of government contracts, in which both parties are public authorities of equal status, is simply not considered. Seen in this light, recourse to the law of administrative contracts to resolve certain issues (relating to authority to conclude, for instance) may be warranted and I would argue that the analogy deserves reconsideration.

The early literature concerning IGA draws analogies with the law of contracts or the law of treaties for two distinct purposes. First, as is the case in Canada, a parallel is drawn between the procedure for the integration of treaties into the Belgian legal order on the one hand, and the procedure for inserting cooperation agreements into the legal order of the various federal partners on the other. The objective is to argue that cooperation agreements are situated above legislation in the hierarchy of norms.¹⁵³ Secondly, the analogies serve as an inspiration to fill *lacunae* in the legal regime applicable to cooperation agreements. This is no doubt useful.¹⁵⁴ What is remarkable is the assumption that cooperation agreements are necessarily legal instruments, to which legal rules must be applied. In fact, there is never any mention that some private or international agreements may not cross the threshold of juridicity. Hence, the principle of *pacta sunt servanda*, and its corresponding rule concerning the binding character of contracts are invoked as applicable “*mutatis mutandis* to every conventional relation, regardless of the legal order in which it takes place”.¹⁵⁵ The paradigm is clearly of legal instruments, to which a set of legal rules should be applied.

It is as if s.92*bis* had automatically conferred binding status to formal cooperation agreements, as a birthright.¹⁵⁶ The actual degree of normative force of such agreements may be low, but the limited doctrine that analysed agreements from the contractual perspective definitely considered them to be on the legal side of the threshold. In other

gouvernement renaissent-ils au contraire de leurs cendres? “, (1999) 2 *RCJB* 5-24.

¹⁵² FLAMME, Maurice-André, *Droit administratif*, Tome II (Brussels: Bruylant, 1989) 827; PAQUES, Michel, *De l’acte unilatéral au contrat dans l’action administrative* (Brussels: Story-Scientia, 1991) 317-320.

¹⁵³ *Infra*, Chapter 6.

¹⁵⁴ They discuss rules for denouncing agreements when no procedure is outline therein, for instance.

¹⁵⁵ KLEIN (1990) 24; MOERENHOUT and SMET (1994) 234; LEURQUIN-DE VISSCHER, Françoise, “Les règles de droit” in DELPÉRÉE, Francis (ed.), *La Belgique fédérale* (Brussels: Bruylant, 1994) 197-224, 224.

words, there is an unquestioned assumption that the adoption of s.92*bis* conferred legal character to agreements between executives that was denied to those concluded before its adoption. Those are, as we shall see, infallibly described as (purely) political instruments.¹⁵⁷

4.2.2 The impact of legislative framework concerning IGAs

This conviction that until 1988-89, executive agreements only amounted to political protocols requires some exploration. In theory, in Belgium, the executive branch only has explicitly attributed competences, residual powers lying with legislatures.¹⁵⁸ A Constitution born of a Revolution, even a fairly peaceful and speedy one, does not protect old Crown prerogatives. Interestingly, the executive was never granted the express authority to contract. The actual source of the power to contract is not even discussed in administrative law textbooks. In the 19th century liberal conception of the State, it may have seemed normal that the executive could contract on the same terms as other legal persons. Arguably, the executive powers which the 1831 sought to harness were unilateral normative powers, not contractual arrangements. With the federalisation process, this power to contract was transmitted to federated entities, and is understood as an attribute of their legal personality.¹⁵⁹ So far, the situation is similar as the Canadian one.

However, while in Canada the executive's inherent capacity to contract is understood to extend to IGAs, no similar transfer occurred in the case of Belgian cooperation agreements. For some, the legislative texts that provided for cooperation between executives prior to 1988-89 were "insufficient" to enable the executives to conclude "cooperation agreements" (which, in context, is clearly meant to designate legal-type instruments).¹⁶⁰ The terse affirmation that until s.92*bis*, agreements were merely political protocols suggests that this specific authorisation was required for the transformation of agreements into legally binding ones. The reasons for this assertion are not clearly spelled out but seem to be based on a number of opinions by the Council of State concerning pre-1988 agreements which are worth examining.

¹⁵⁶ See, for instance, KLEIN (1990) 24 for whom, regardless of which body of law is used as analogy, *pacta sunt servanda* would apply. The assumption is clearly that cooperation agreements are legally binding *inter partes*.

¹⁵⁷ ALLEN and PEETERS (1989) 362. In the late 1980s, ALLEN was then Secretary to the Prime Minister and clearly had access to a number of protocols which were never published.

¹⁵⁸ S.105, *Constitution* (for federal order) and s.78, 1980 DMA (for federated authorities); CRAENEN (1996) 18, 33; PEETERS, Patrick, "The Executives" in CRAENEN, G. (ed.), *The Institutions of Federal Belgium: an Introduction to Belgian Public Law* (Leuven: Acco, 1996) 95-107, 104. See also s.33, *Constitution*, which entrenches the doctrine of national sovereignty, which would appear to preclude any inherent executive powers. The same rule applies to federated entities: ss.78 of 1980 DMA; 38 of 1989 DMA on Brussels and 51 of 1983 OA on GC.

¹⁵⁹ Ss.3, 1980 DMA; s.3, 1989 DMA on Brussels and s.2 of 1983 OA on GC.

¹⁶⁰ De WILDE (1990) 96; ALLEN and PEETERS (1989) 351 ff.; LAGASSE (1999) 348.

4.2.2.1 The character of pre-s.92bis agreements

If s.92bis transformed political agreements into legal instruments, pre-1988 judicial pronouncements should reveal obstacles to the binding character of executive agreements which this provision has now removed. A number of opinions of the CSLS seem to have exerted a particular influence on doctrinal analysis regarding the status of IGAs.

The first relates to agreements concluded between the German-speaking Community and the other two Communities at a time when the former had express power to conclude such agreements, but before s.92bis extended that power to the latter.¹⁶¹ Those were framed in very general terms, as agreements concerning cultural cooperation often are. Perhaps to ensure a degree of solemnity, the parties sought to have the agreement endorsed by their respective legislative assemblies. The CSLS saw no objection with the process, noting simply that the executives were thereby curbing their freedom somehow since any modification would require legislative action. There is no discussion of the status of the agreement (called interchangeably “convention” and “accord de coopération”) as such. One cannot conclude from this half-page opinion, that no other pre-1988 IGA could be binding *inter partes*.

The second opinion related to a protocol creating a Housing Depreciation Fund following the regionalisation of social housing.¹⁶² The CSLS found the arrangement unconstitutional because the federal government retained powers concerning the nomination of regional representatives, as well as the power to withdraw general grants from the region if they failed to properly finance the Fund in question. This was seen as a violation of regional autonomy. The CSLS qualified as a “political agreement” a protocol (not reproduced) previously concluded between federal and regional authorities concerning this arrangement. Again, no criteria were given to support this characterisation, apart from an affirmation that the creation of a Fund with legal personality would require legislative action on the part of every party to such an agreement. This is not a statement that parties could not bind themselves, but a statement that they could not violate the distribution of competences, or create an organ with legal personality without parallel legislation. There is no wholesale incapacity to bind governments, but rather, again, obstacles of a *ratione materiae* character.

The CSLS's most influential opinion concerning the need for specific authorisation for the conclusion of legally binding agreements related to a projected agreement between the Walloon Region (in charge of the placement of unemployed workers) and the French

¹⁶¹ CSLS 16.11.1984, Doc. CCF, 1984-85, 174/1, 3; UYTENDAELE and COENRAETS (1991) 4; COENRATS (1992) 159.

¹⁶² CSLS 23.02.1987 (MB 16.04.1987); ALLEN and PEETERS (1989) 362.

Community (in charge of labour training).¹⁶³ Prior to the transfer of this competence from the federal authorities, policies related to both had been developed and implemented by a single body. The French Community and the Walloon Region sought to create a joint organ to succeed this national one, on the French side of the country.¹⁶⁴ They drafted a “convention” which they sought to submit to their respective assemblies. Called upon to give its opinion on the scheme, the CSLS made a number of remarkable statements.¹⁶⁵ Unfortunately, this opinion, which is quite central to understand the very purpose of s.92*bis*, was never published.¹⁶⁶

First, the CSLS expressly stated that cooperation could only be of a political character, unless it were specifically authorised.¹⁶⁷ The Council inferred the authorisation to create a joint body from clauses authorising cooperation between governments, as well as between legislative assemblies.¹⁶⁸ The obstacle, however, was in the method chosen to create the joint body. For the CSLS, drafting a joint text, and then simply asking legislatures to approve it, deprives parliamentarians of their power to discuss legislative proposals, article by article. This could not be accomplished without specific legislative authorisation. Similarly, the Council held that in the absence of express authorisation, Communities and Regions could not “subordinate” their own decision-making power to another order, which the creation of a joint organ would imply.¹⁶⁹

The CSLS then proposed an alternative solution. It suggested that parties conclude an agreement “which can only have the force of a political protocol”.¹⁷⁰ Clearly, this was due to the lack of explicit quasi-constitutional authorisation enabling the parties to bind themselves in law. Then, one party (for instance, the Walloon Region) could create the public body by statute and authorise it to act on behalf of another order of government. The French Community would then legislate to confer missions unto that same body.¹⁷¹ The CSLS underliend that the autonomy

¹⁶³ CSLS 16.444/9 (02.12.85), on proposed joint organ to deal with labour training and the placement of unemployed workers, unpublished, on file with author.

¹⁶⁴ Flemish authorities had done so, which was more easily accomplished, given that their institutions had partially been “merged”.

¹⁶⁵ Formally, the opinion related to the Walloon bill proposing to endorse the convention.

¹⁶⁶ This is not unusual: governments must seek the Council's opinion on all proposed legislative instruments, but have the freedom to publish that opinion in their parliamentary documents or not. In this case, the proposed legislation, which the Council denounced, was simply never adopted and no document relative to it was ever published. It is obvious, however, that the ruling was very well known to constitutional negotiators who introduced s.92*bis*. It was, in fact, paraphrased by a number of authors, who *never explicitly* referred to it: for ex. de WILDE (1990) 97. I was given the opinion in confidence.

¹⁶⁷ *Ibid.*, 10.

¹⁶⁸ *Ibid.*, 14.

¹⁶⁹ *Ibid.*, 17.

¹⁷⁰ “[C]elui-ci ne peut avoir que la valeur d’un accord politique”: *ibid.*, 18.

¹⁷¹ This was done, see subsequent opinion of the LSCS, published, this time: Doc CRW, SO 1987-1988, 213/1; Doc CCF, 1988-89, 38/1. See also: Doc CRW, 1996-1997, 268/1 (all on professional training).

granted to each order of government implies that it can withdraw those missions from the organ so created.¹⁷² Such arrangements are very similar to those currently concluded in Canada.

In 1989, ALEN and PEETERS discussed a number of other pre-1988 protocols, including several unpublished ones, which, in their view, only also amounted to policy statements.¹⁷³ These included an agreement by executives to introduce parallel legislation in order to allow federal civil servants to collect taxes on behalf of regions,¹⁷⁴ an agreement on information sharing in environmental context,¹⁷⁵ or a commitment to restrict hospital beds.¹⁷⁶ In some cases, regulations even envisaged their conclusion.¹⁷⁷ Clearly, again, this was not considered sufficient to remove obstacles to legal characterisation.

It may be exaggerated to conclude that prior to s.92*bis*, no executive agreement could ever give rise to legally binding obligations. It is clear, however, that none of the instruments which the CSLS was called upon to assess was considered to be of legal character. It is undisputable, however, that the CSLS' opinions raised a number of obstacles to the legal characterisation of those agreements, which negotiators of the 1988 constitutional reform sought to overcome. Section 4.2.2.2 considers the limitations *ratione materiae* that have likely been eliminated by s.92*bis*, and those which still represent obstacles to the legal characterisation of executive agreements today.

The general understanding that in the absence of an explicit authorisation, no cooperation agreement could be of legal character has generated the converse understanding. The literature seems to imply that since the adoption of s.92*bis* in 1988-89, every executive agreement constitutes a legally binding instrument. In my view, this inference is also exaggerated. The characterisation of a cooperation agreement as a contractual instrument, binding governments party to it, requires an analysis *in concreto*, taking notably into consideration public law impediments that may still preclude IGAs from binding executives. Before considering those, however, another aspect of the legislative framework surrounding IGAs that may potentially influence their characterisation must be considered.

¹⁷² Again, this is consistent with the current Canadian situation. Whether s.92*bis* actually had the effect of modifying this possibility of "unilateral" withdrawal, is uncertain: *infra*, 6.1.2.

¹⁷³ ALEN and PEETERS (1989) 362 ff.

¹⁷⁴ Protocol of 05.03.1985 (14.06.1985) on the purchase of school buildings: ALEN and PEETERS (1989) 363.

¹⁷⁵ CSLS, Doc Parl, Ch 1985/86 542/4, 16.

¹⁷⁶ ALEN and PEETERS (1989) 364.

¹⁷⁷ "Arrêtés royaux".

4.2.2.2 The impact of a specific dispute resolution mechanism on characterisation

The insertion of formal cooperation agreements in the Belgian legal order in 1988-89 was accompanied by the creation of original dispute resolution mechanism, so-called cooperation tribunals (*“juridictions de coopération”*). The purpose of the present sub-section is not to describe how those tribunals would eventually resolve disputes *inter partes*. The objective here is precisely to examine the potential impact of the creation of a specific dispute resolution mechanism on the status of post-1988 agreements.¹⁷⁸

S.92bis(4) provides that disputes relative to the interpretation or implementation of *compulsory* agreements must be submitted to *ad hoc* cooperation tribunals.¹⁷⁹ Parties to an optional agreement *may* also submit disputes to such tribunals.¹⁸⁰ Third parties are explicitly denied standing to do so.¹⁸¹ Each party to an agreement designates a member, otherwise they are to be appointed by the President of the Court of Arbitration.¹⁸² The President must be a professional magistrate and is selected by the designated members of the tribunal, failing which s/he will also be appointed by the President of the Court of Arbitration.¹⁸³ A flurry of details govern rules of procedure, majority vote, rights of the defence and so on.¹⁸⁴ Decisions of such tribunals are directly enforceable (*“exécutoire”*). This is in derogation to the administrative law principle prohibiting execution against the administration.¹⁸⁵ These are all compatible with an arbitration-type institution.

In fact, cooperation tribunals were originally described as “arbitration colleges” (*“collèges d’arbitres”*), a designation deemed unorthodox by the CSLS because in Belgian law public authorities cannot submit to compulsory arbitration.¹⁸⁶ Since disputes concerning compulsory agreements must be submitted to such tribunals, their designation was simply

¹⁷⁸ See introduction to this Chapter.

¹⁷⁹ S.92 bis (5) 1980 DMA. See also 1989 OA on the Tribunal mentioned at art. 92 bis of 1980 DMA as amended, MB 24.01.1989 [hereinafter “1989 OA”].

¹⁸⁰ S.92bis (5)(6); DELPÉRIE and DEPRÉ (1998) 313; COENRAETS and UYTENDAELE (1991) 12-15. This optional character is confirmed in the *Guidelines for drafting cooperation agreements* 27.10.1999.

¹⁸¹ In at least one instance, parties chose to split the legal recourse between the tribunal and ordinary courts, so that third parties could defend their rights under the agreement: Accord de coopération relatif à la gestion administrative de l’enseignement en Communauté germanophone, 07.08.89 (05.10.89).

¹⁸² S.2, 1989 OA.

¹⁸³ S.2, 1989 OA.

¹⁸⁴ Notably in the 1989 OA. Specific rules govern the recusal of members, prior optional conciliation, timing for filing facts, language of proceedings, etc.

¹⁸⁵ S. 1710 of the *Judicial Code*. Note, however, that the case law is evolving in this respect, and Courts are more likely to enquire whether execution (such as seizure) would have negative impact on public interest: *Tetraplegique*, 05.05.1986, civil Bruxelles (J. Saisies), (1986) *Rev Gén de droit* 335.

¹⁸⁶ CSLS 18.806/2, Doc Parl 635/1, 1988-89, 80; *Libois et Danheux c. Communauté française*, C. Cass, 1^{ère} ch., no. 374, Pas., (1996) 973.

changed to “*juridiction organisée par la loi*” (court organised pursuant to a federal Act).¹⁸⁷ This designation as a “*juridiction*”, and the fact that it is organised by an ordinary federal Act is compatible with the exclusive federal power in matters of judicial organisation. They also suggest that within the Belgian legal order, they are envisaged as “real” - if quite unusual - courts of law.¹⁸⁸ Yet, whatever their formal label, cooperation tribunals are clearly designed as arbitration panels. At a loss, the federal Minister in charge of constitutional reform simply described them as “*sui generis*” institutions.¹⁸⁹

The very invention of these cooperation tribunals illustrates the ambivalence of the constitutional negotiators concerning the status of IGAs *inter partes*. On the one hand, the fact that disputes are not simply left in the political arena supports a legal conception. Tribunals render final, binding and executory decisions.¹⁹⁰ On the other, the federal government rejected suggestions that the Court of Arbitration be empowered to interpret and enforce them.¹⁹¹ The choice of a new institution potentially composed of a majority of non-jurists,¹⁹² when an existing judicial forum could have fulfilled that function, suggests a preference for non judicial dispute resolution.

More problematic, is the fact that parties are free to submit their disputes to *ad hoc* tribunals, or to exclude judicial control altogether.¹⁹³ In the absence of specific attribution, no other court would apparently be competent to resolve this type of dispute.¹⁹⁴ For UYTENDAELE, the failure to submit disputes to cooperation tribunal does not alter the character of an agreement.¹⁹⁵ In earlier writing, he pointed out that in this case, the only recourse open to an injured party would be to call upon the Concertation Committee, a clearly political organ.¹⁹⁶ Is there simply a judicial vacuum concerning a legal instrument

¹⁸⁷ Doc Parl 635/1, 1988-89, 80; UYTENDAELE (1991) 13. It is not clear why the parties chose not to amend the *Judicial Code*. This could have been a question of timing, as the problem of limits on arbitration was only raised by the CSLS in its assessment of the bill implementing the tribunals, which was elaborated a few months after the insertion of the institution in the 1980 DMA. Interestingly, the CSLS held that because these were called upon to resolve a new type of disputes, they did not constitute “extraordinary courts” prohibited by s. 94 (now 146) of the Constitution.

¹⁸⁸ The CSLS added that as a new type of court, cooperation tribunals had to be instituted by an ordinary federal Act, not by a DMA. Consequently, the details concerning these courts were moved from s.92*bis* of the 1980 DMA to 1980 OA.

¹⁸⁹ Doc Parl, Ch, 1988-89, 635/18, 613.

¹⁹⁰ S.92*bis*(5) and 1989 OA, s.47.

¹⁹¹ Debates on amendments to s.92*bis*, Doc Parl, Ch, SO, 1988-89, 635/18, 611-615; 635/15, 1-2; Doc Parl Ch, SE 1988-89, 635/18, 614.

¹⁹² Only the president of each tribunal need be a professional magistrate: s.2, 1989 OA.

¹⁹³ S.92*bis*(4)(5) only discusses compulsory agreements.

¹⁹⁴ For ALEN and PEETERS (1989) 369. In Belgium, by contrast to Canada, there is no court of “inherent” jurisdiction. In other words, a matter may raise legal issues for which there is no court of competent jurisdiction. It is likely that ordinary courts would have jurisdiction over agreements (or specific clauses) that can be analysed as dealing in private law: *infra*, 4.2.2.2 (on civil law obligations).

¹⁹⁵ UYTENDAELE (2001) 867.

¹⁹⁶ COENRAETS and UYTENDAELE (1991) 10.

(assuming other criteria are met)?¹⁹⁷ The riddle deepens given that nothing prevents parties to an agreement that does not explicitly refer to such tribunals from setting one up at a later stage, when a dispute does arise. Would this late inclusion modify the legal character of the agreement?

There is strong evidence that cooperation tribunals were imagined in haste, in order to reassure reluctant parties concerned that compulsory agreements would be left to political good-will, which can be in short supply in a process of federalism by dissociation. The solution was simply to blur the issue. Dispute resolution would not be left simply to the political arena, nor would it be handled by existing judicial organs. It would lie with a hybrid institution which, in the commonly used Belgian strategy, allowed for alternative readings: some would consider the tribunals as essentially political, others as essentially judicial. Moreover, in most cases, the question is left open since optional agreements do not, as a rule, provide for such tribunals.

More cynically, it appears that a number of the key decision-makers understood that though introduced in the DMA and endowed with a specific Act detailing rules of procedures, those tribunals would never actually be established. The sophisticated construction on paper would reassure those concerned with certain aspects of the constitutional decentralisation process, but in the end, any dispute concerning the agreements would be resolved politically.

The impact of cooperation tribunals on the legal character of cooperation agreements is ambiguous. After fifteen years, more than 200 agreements, and a particularly antagonistic federal system, no dispute has yet been submitted to these elusive tribunals, endowed with a very sophisticated organic law. This does not necessarily mean that no dispute could ever be submitted to these peculiar dispute resolution institutions, but it indicates that the will to “juridicise” IGAs was relative, or at least, contested.¹⁹⁸

The adoption of s.92*bis* may have facilitated the adoption of legally binding agreements *inter partes*, although it did not automatically transfer every such agreement to the legal side of the threshold. A test for assessing their legal character would therefore seem to be apposite, as it is in the Canadian context. This is the object of the third part of

¹⁹⁷ This, of course, directly raises the link between legal characterisation and justiciability, which common lawyers often take for granted, but which here, is clearly divorced.

¹⁹⁸ Indeed, even in federations with structured dispute resolution mechanisms relative to IGAs, such as Switzerland or the United States, disputes are very largely resolved through political channels. While the question of courts of competent jurisdiction is slightly more complicated, it is also the case in Canada. We saw that only a handful of Canadian cases have interpreted or enforced IGAs over a century.

this chapter. As in the Canadian case, however, it is worth reflecting on the potential application of certain “public law impediments” to the characterisation of IGAs as contractual instruments. Again, they include issues of capacity and authority, as well as limitations *ratione materiae*.

4.2.3 Public law impediments

4.2.3.1 Capacity and authorisation

If I am wrong in concluding that even before 1988-89, executives could have the capacity to bind themselves through certain forms of agreements *inter partes*,¹⁹⁹ the adoption of s.92*bis* has resolved any lingering doubt. Two issues remain, however. One is related to the very peculiar entity that is the French Community Commission of Brussels (COCOF). This complex institution acts concurrently as a federated entity, and an administrative agency of the French Community.²⁰⁰ In its first incarnation, it has the capacity to conclude cooperation agreements, in its second it does not. This has led to bizarre arrangements. Hence, a cooperation agreement was concluded between the COCOF and the French Community on matters over which the former has legislative competences, while a “convention”, written in similar terms, was signed between the same parties, for the same purpose, over the decentralised competences.²⁰¹ The first was submitted to legislative assemblies, the second was not. Yet, they are assuredly meant to accomplish the same thing. Such mind-boggling arrangements attest not only to the complexity of the Belgian federal system, but also to the effectiveness of most agreements, regardless of formal legal characterisation.²⁰²

The second issue is fortunately less impenetrable. It relates to the authority of particular signatories to bind their respective legal orders. Pursuant to s.92*bis*, cooperation agreements are concluded by “competent authorities”. So far, all formal cooperation agreement have been signed by Ministers and approved by their respective governments. There seems little doubt that this is sufficient authority to bind federal partners (in law).²⁰³

¹⁹⁹ *Supra*, 4.2.2.1.

²⁰⁰ As a federated entity, it enjoys legislative powers which were transferred to it in 1994 by the French Community, as a decentralised agency, it implements legislation adopted by the same! MOERENHOUT (2001) 125.

²⁰¹ AC relatif aux modalités d'exercice des relations internationales de la Commission communautaire française (Fr C + COCOF), 30.04.98 (21.08.98, 02.12.98); Report to the Council of the CCF: Doc Parl CCF, 1997-1998, 239/1 (*Walry*).

²⁰² *Infra*, General Conclusions.

²⁰³ With the exception of agreements requiring legislative assent: *infra*, 4.2.2.2. On delegation of powers to Ministers: MOERENHOUT (2001) 159.

This is not necessarily the case, however, of the growing number of IGAs concluded on the margins of formal cooperation agreements. Some, entitled “protocols” are concluded by Ministers, notably in the context of interministerial conferences or the Concertation Committee, but are not necessarily endorsed by their entire respective governments. Other IGAs are concluded by civil servants or other political staff, notably in working groups or various intergovernmental committees. The extent of this practice is difficult to assess. Whether these actors have the authority to conclude IGAs that are binding *qua* contracts is unclear. As in the Canadian case, their authority would likely depend on rules of public law within their respective legal orders, and could raise issues of ostensible mandates and so on.²⁰⁴ This is where a potential analogy with ordinary government contracts, which is summarily rejected by Belgian analysts, could be relevant.

4.2.3.2 Limits *ratione materiae*

There is no prohibition in Belgium concerning the conclusion of cooperation agreements of a political nature, any more than there is in Canada.²⁰⁵ S.92*bis* is drafted in permissive terms and allows parties to conclude agreements which “notably” deal with the creation and management of joint services or institutions, the joint exercise of respective competences (“*compétences propres*”), or the development of joint initiatives”. Despite this very broad, and non-exhaustive, wording, governments still face certain *ratione materiae* limitations.

- **Constitutional limitations**

The Belgian Court of Arbitration and the legislative section of the Council of State have consistently ruled that federal partners may only conclude cooperation agreements in the exercise of their respective constitutional powers.²⁰⁶ Agreements may not be used to transfer, trade, cede or accept constitutional competences, even with parliamentary approval.²⁰⁷ These limitations are examined in greater detail in Chapter 6, as they essentially rest on the subordination of agreements to constitutional and quasi-constitutional norms. At this stage, three examples will illustrate the type of *ratione materiae* limitations that can preclude the characterisation of IGAs as legally-binding instruments *inter partes*.

In its assessment of a bill meant to implement a European directive on the liberalisation of electricity, the CSLS contested the constitutionality of a clause anticipating

²⁰⁴ *Supra*, 4.1.2.1

²⁰⁵ *Supra*, 4.1.2.2.

²⁰⁶ Some of their rulings and opinions are discussed in Chapter 6, as this is essentially a question of the subordination of agreements to the Constitution in the hierarchy of norms.

the conclusion of a cooperation agreement to clarify grey zones in the distribution of competences between federal authorities and Regions. For the Council, this is not the role of s.92*bis*: federal partners cannot, by consent, alter the distribution of competences.²⁰⁸ The CSLS has also strongly denounced the use of agreements as instruments of spending power. An entity can only fund a project over which it has legislative authority. Hence, the CSLS held unconstitutional an agreement enabling Regions to invest in the rail system, an exclusively federal matter.²⁰⁹ Respect for the autonomy of components of the federation, coupled with the exclusivity of competences, leads to a constitutional bar on the use of agreements to impose conditions even on an apparently consenting order of government.²¹⁰

- **Required legislative assent**

S.92*bis* explicitly provides that certain types of agreements require the assent of the legislative assembly of each party to a cooperation agreement, including agreements that introduce obligations for citizens.²¹¹ Put another way, executives cannot legislate by contract. This question is addressed in Chapter 5, which considers the status of IGAs as normative instruments *erga omnes*.

S.92*bis* also requires legislative assent when agreements have financial implications for parties, or if the matter can only be resolved through statutes. These two conditions constitute limitations *ratione materiae* to the legally binding character of agreements *inter partes*. In other words, regardless of the intention of executives party to an agreement, if their undertakings require public funding and is not approved by legislatures, it cannot constitute a legally binding instrument.²¹² This would amount to a violation of a specific provision of s.92*bis*. This is the equivalent to a norm of public order in civil law, or, to stretch the analogy, to a norm of *jus cogens* in international law. The same is true of agreements that deal with matters that are reserved to the legislative branch, although the frontier between the legislative and regulatory fields is extremely imprecise.²¹³

²⁰⁷ CA17/94; VELAERS, Jan, *De Grondwet en de Raad van State: Afdeling wetgeving* (Antwerp: Maklu, 1999) 876.

²⁰⁸ CSLS (29.12.1999), Doc Parl Ch, 1998-1999, 1933/1, 51-52. On other opinions to same effect by the CSLS: MOERENHOUT (2001) 609-616.

²⁰⁹ CSLS 32.367, Doc Parl VI R (2001-2002) 269, no.1, SNCB.

²¹⁰ CSLS Doc Parl CRW 1998- 1999, 518/1 (WR cannot undertake to spend in GC in matters that fall within Walloon competences, as this would amount to tie its exclusive competence in a unilateral manner).

²¹¹ “*Qui lient les Belges individuellement*”.

²¹² There are number of agreements – and protocols – containing a repartition of costs concerning a particular programme between the various orders of government. Those are rarely, if ever, submitted to legislative assent: Protocole relatif à l'organisation d'une enquête sur la santé, MB 03.06.1997.

The envisaged legislative assent is not the equivalent to parliamentary appropriation in Canada, which is accomplished in very general terms.²¹⁴ While a list of agreements and protocols involving public funds is appended to Acts approving budgets, this is not sufficient. S.92*bis* imposes that the agreement itself, and any subsequent agreement modifying it or implementing it, be submitted to assemblies.²¹⁵

Finally, the actual character of the legislative Act giving assent to an IGA is uncertain. For some, it is a formal act on parliamentary control over the executive, by contrast to a truly normative, legislative action. Others, maintain that it has the actual force of statute.²¹⁶ The distinction may be relevant to the characterisation of the instrument as a norm *erga omnes* and potentially to its place in the hierarchy of norms. It is not, however, to the characterization of the agreement as a contractual instrument: so long as assemblies approve it, this *ratione materiae* restriction is lifted.

- **The "rule against abdicating freedom of executive initiative"**

When contracting with private parties, executives in Belgium may not bind themselves with regards to fundamental "government functions". For instance, the Council of State has ruled that the Flemish Region could not restrict its regulatory power by concluding "environmental conventions" with business association unless the legislation guaranteed that the executive could still intervene in the public interests.²¹⁷ This "rule against abdicating freedom of executive initiative"²¹⁸ is a close cousin to the common law rule against fettering of discretion.

Remarkably, this limit *ratione materiae* has never been invoked in the literature on cooperation agreements. It is as if s.92*bis* had the effect of relaxing the rule that public authorities may not contract regarding government matters. Parties to cooperation agreements can bind themselves with regards to their "government functions" to the extent that they do not abdicate a constitutional power in favour of another government.

In a federal system in which powers are nearly all distributed on an exclusive basis, the line between the abdication of a constitutional power and a permissible commitment to

²¹³ Certain constitutional provisions expressly provide that a matter must be governed by statute (and by implication cannot be the object of delegated legislation, for ex. s.63, *Constitution* (determination of political ridings): MAST (1989) 28-29.

²¹⁴ As we saw, appropriation only affects the executory character of a contract or an IGA, not its legal characterisation *per se*: *supra*, 4.1.2.3.

²¹⁵ CSLS 24.479, Doc CRW, 1995/96, 162.

²¹⁶ *Infra*, 5.2.1.

²¹⁷ CSLS 22.285/8, Doc Parl FI 1992-1993, 401/1.

another order of government may be thin. For instance, the Council of State held that federal undertakings not to extend the application of particular tax amounted to an abandonment of constitutional competence in favour of Regions, since the determination of the tax base was an exclusive federal competence.²¹⁹ In exchange, the Regions had also undertaken not to exercise certain of their taxing powers. For the CSLS, this fell outside the purview of s.92*bis*. The Council does not affirm that it is a political instrument, but clearly denies its legal character. In Canada, this would likely have been analysed through the prohibition to contract for legislation.²²⁰

• The problem of civil law obligations

A notable difference with the Canadian situation relates to IGAs that contain undertakings of a civil or commercial nature. Indeed, we saw that in Canada, contracts that are clearly governed by the private law of contracts can be classified as IGAs. This is the case of leases, sales, or security for loans.²²¹ In fact, a strict application of the rule against fettering would imply that only such agreements could undoubtedly be legally-binding *inter partes*. Considering such “private” law contracts as IGAs is not problematic because both are subject to the same judicial institutions.²²²

In theory, the conclusion of civil law arrangements should not be excluded from the non-exhaustive list of allowed subject matters included in section 92*bis*. The difficulty is not truly one of content, but of courts of competent jurisdiction. “Ordinary” government contracts are subject to ordinary courts.²²³ As we saw, cooperation agreements are subject to special cooperation tribunals.²²⁴ This has two consequences. Either, agreements that qualify as civil contracts are disqualified as cooperation agreements.²²⁵ Or, a sub-category of optional agreements, those which share very close resemblance to private contracts, are subject to

²¹⁸ QUERTAINMONT, Philippe, “Les nouveaux instruments contractuels utilisés par l’Administration et la compétence du juge administratif”, (2000) 1 *TPB* 39-52, 43.

²¹⁹ CSLS, Doc Parl, Senate 1997-1998, I-803/1, 13-14 (Eurovignette); MOERENHOUT (2001) 610.

²²⁰ See, however, the arbitration decision on the Tax Rental Agreements which did not comment on the potential invalidity of agreements not to tax: *supra*, 4.1.3.

²²¹ Some such IGAs are actually included in the federal registry of IGAs: loan agreements, concession, etc.

²²² *Supra*, 1.2.3.

²²³ S.145, *Constitution*. The Council of State does not have jurisdiction over contracts of the administration.

²²⁴ This jurisdiction is compulsory in the case of compulsory agreements, and optional... in the case of optional ones, that is, parties may choose to submit them or not.

²²⁵ This is the solution in Switzerland, where only agreements concluded pursuant to the “puissance publique” are considered intercantonal conventions (*de jure imperii*). Agreements which are founded on *de jure negotii* are ruled by civil law and are considered private law contracts: AUER, Andreas, MALINVERNI, Giorgio, HOTTELIER, Michel, *Droit constitutionnel suisse, vol. 1: L’État*, (Berne: Staempli Editions, 2000) 554 and cases cited. In its opinion on the constitutionality of cooperation tribunals, the CSLE noted that they did not contravene s.145 of the Constitution (which reserves the

the jurisdiction of ordinary courts, even if the parties chose to submit a dispute to a cooperation tribunal.²²⁶ In other words, the only category of IGAs which are undeniably legally binding in Canada, are either not considered to be IGAs in Belgium at all, or are a marginal sub-category of IGAs. Such agreements would qualify as legal instruments, but not as cooperation agreements.

At least one agreement explicitly provided for the resolution of certain types of disputes by ordinary courts (those assessing past debts). The agreement also stipulated that parties could agree to seize an ordinary court, rather than a cooperation tribunal, of disputes relating to administrative questions.²²⁷ The agreement was never submitted to legislative assemblies. Consequently, the Council of State did not have the opportunity of pronouncing on the legality/constitutionality of the clauses (which were apparently never used). Other civil-types of clauses, which could fall within the exclusive jurisdiction of ordinary courts, regardless of any explicit provision to that effect, would include those specifying which order of government will assume responsibility to pay salaries, or be liable for damages caused by employees working in a joint scheme.²²⁸

Another potentially relevant factor is that “private” government contracts require the equivalent of parliamentary appropriation, but not specific legislative assent. In other words, if clauses in an IGA are considered of a civil law nature, they would not be affected by a particularly onerous public law impediment, that is the requirement of legislative assent. Of particular interest in this context would be a number of agreements through which federal partners determine respective shares of the cost of common projects.²²⁹ While the purpose is undeniably of a public law nature, it is at least arguable that the refusal by a party to pay its share could be qualified as a civil-type contractual dispute. A number of such agreements have not received legislative assent.

resolution of disputes concerning civil rights to ordinary courts) since they did not deal with civil matters: CSLS, (24.11.1988) Doc Parl Ch 1988-89, 635/1, 80-83.

²²⁶ MOERENHOUT and SMET (1994) 177, admit this possibility. A cooperation agreement that contains both types of clauses would be subject to the jurisdiction of two judicial institutions – neither of which having authority over the entire agreement.

²²⁷ AC relatif à la gestion administrative des charges du passé en matière d'enseignement (FED + Fr C + FI C), 07.08.89 (05.10.89).

²²⁸ AC relatif au transport interne (WR – Fr C), 25.05.98 (04.09.99 ; 23.12.99); AC relatif au centre fermé pour le placement provisoire de mineurs ayant commis un fait qualifié d'infraction (FED + 3C), 30.04.02.

²²⁹ AC pour une politique de drogues globale et intégrée (FED + 3C + COCOF + COCON + COCOM + 3R), 11.05.2003 (02.06.2003)

4.2.4 Assessing the case law regarding post-1988 agreements

A number of judicial assessment concerning pre-1988 agreements were reviewed earlier.²³⁰ Since then, there has been substantial judicial pronouncement concerning the validity and constitutionality of agreements (mostly, but not exclusively by the CSLS). However, the number of cases concerning the status of agreements themselves is extremely limited. None have dealt with the issue head-on. Two cases, however, provide some clues regarding criteria which, over and beyond public law impediments, may be relevant to the characterisation of agreements as binding instruments *inter partes*.

The first is an opinion by the CSLS regarding a 1998 cooperation agreement between the Walloon Region and the German-speaking Community. It is framed in lofty terms.²³¹ The Council held that it did not have jurisdiction to give an opinion on, “a number of clauses [that] are deprived of any normative force (*“portée”*)”. In other words, regardless of their degree of solemnity (this agreement bears the name “cooperation agreement” and received legislative assent), most of its content would not appear to be amenable to legal characterisation. Such a statement is, however, at odds with the pervasive conception of IGAs as legal instruments.

The second case was rendered by the Council of State, acting in its curative function, this time. The convoluted fact pattern flowed from successive constitutional reforms.²³² In 1997, an agreement was concluded between federal authorities and the French Community concerning the “loan” of federal civil servants to the former for purposes of collecting a tax that had been “communitarised”. The agreement was neither submitted to legislative assemblies, nor published. In 2001, the same tax was “regionalised”. The Walloon Region did not wish to maintain the arrangement made by the French Community, to which it was succeeding. Affected employees seized the Council of State, which declined to annul the decision not to automatically keep them all on payroll. It ruled that the Region was not a party to the 1997 agreement and had no obligation to maintain the arrangement. This consideration of the Walloon Region as a third party clearly suggests an underlying contractual analysis. How the Council would have analysed the situation had the instrument been approved by legislation, and thus been transformed into norms *erga omnes*, is unclear.²³³

²³⁰ *Supra*, 4.2.1.1.

²³¹ As was the case with the pre-1988 version: *supra*, 4.2.2.1.

²³² CSAS 115.975 (17.02.2003) (*Monfils*).

²³³ The case was clearly not argued as a contract, however (the Council of State may not have been competent then). There is no suggestion that the Region could have succeeded the Community in its arrangement. Had the agreement been approved by legislatures, it may be that the Region would have been bound by the legislation, until it chose to amend it. This would have squarely raised the issue of the possibility of legislating against a cooperation agreement, the key question concerning the

4.2.5 Summary conclusions

The contractual character of Belgian cooperation agreements has given rise to very little analysis. The main purpose for inserting the formal institution in the legal order in 1988-89 was to remove obstacles to joint action that were derived from the Council of State's very strict interpretation of the impact of the exclusive distribution of competences. It was also to allow the creation of joint organs, and, as we shall see in Chapter 5, the joint adoption of norms of general application. The binding character *inter partes* was not the main concern, and that is still the case.²³⁴

Still, the few authors who have considered this aspect of the institution tend to tacitly assume that s.92*bis* transformed what could only be political protocols into instruments that are necessarily of a legal character. Authority for the first branch of this assumption is not altogether convincing (at least with regards to the status *inter partes*). As for the second, it must be nuanced. The equivalent to the rule against fettering which still has the potential of preventing the characterisation of Canadian IGAs as contractual instruments, has clearly been removed in Belgium.²³⁵ Despite this facilitation, the status of current cooperation agreement still requires an analysis *in concreto*, taking into consideration a number of indicia of legal character. For instance, agreements with very little "normative content" may fall outside the purview of s.92*bis*. Agreements that fail to meet certain formalities, notably legislative assent when required, also. These indicia of binding character are examined – amidst others - in the following section of this Chapter.

4.3 Establishing the contractual status of IGAs

I mentioned earlier that the determination of the legally binding character of IGAs *inter partes* implies the identification of a "threshold of juridicity" between "purely political" agreements and those which the legal system will enforce, or at least "recognise", in the sense that some form of third party arbitrator can at least declare that a breach has occurred. Placing IGAs on either side of this threshold is a matter of characterisation, which proceeds through the use of a number of indicia. In the following subsection, those will be divided into three categories: content, form, and dispute resolution. The balance between content and form is a particularly complex one.

place of IGAs in the hierarchy of norms (*infra*: Chapter 6). As it was, the question did not arise. For the record, this famous tax has now been abolished altogether!

²³⁴ Again, the binding character must be distinguished from their place in the hierarchy of norms, although if located high in that hierarchy, their status *inter partes* would of course be particularly well protected: *infra*, Chapter 6.

In the absence of a formal institution of IGAs, the kind of undertakings contained in a particular agreement will be very influential in its characterisation as a legal or purely political instrument. IGAs that contain discretionary, woolly or conditional commitments and that are framed in exhortatory language (“parties will do their best to ensure X ...subject to local conditions”) are unlikely to be characterised as legal instruments. In other words, to adapt a metaphor developed by CRAWFORD in a slightly different context, the nature of the “cargo” (the types of undertakings) will be highly influential in the characterisation of the “vehicle” (the IGA itself).²³⁶

The situation is more complicated when a legal order expressly provides for IGAs, as is the case in Belgium. This is simply because the choice of a “formal” instrument, concluded pursuant to the “*règles de l’art*”, by the proper authorities, will carry a strong presumption that the instrument is legally binding irrespective of its content. In that case, an IGA is treated in a similar fashion to more classic sources of public law: It may have very little normative content, but it is still of legal character. The question is whether such a presumption is rebuttable or not.

This type of conundrum has generated a substantial debate in the public international law literature. Seeking to distinguish agreements of a legal character from those which are “purely political”, internationalists have juggled with these issues of threshold of juridicity, relative normativity, and the contest between form and content for a number of years.

Direct transpositions are not warranted, since components of a federation are bound by a number of constitutional and other legal obstacles that do not encumber sovereign States in the international sphere. The analogies are nevertheless helpful to attempt to decode the prevalent conceptions of the status of IGAs in Belgium and Canada, in spite the paucity of the actual analysis of the status of IGAs *inter partes* in both federations.

4.3.1 A detour through public international law

At international law, treaties are subject to a particular legal regime, notably the *Vienna Convention on the Law of Treaties*.²³⁷ Unfortunately, this Convention contains no operative definition to distinguish binding treaties from “purely political” agreements between

²³⁵ The term “potential” is meant to convey the apparent tolerance of Canadian courts for limitations of executive discretion through cooperative schemes, despite the theoretical position: *supra*, 4.1.5.

²³⁶ CRAWFORD proposed the metaphor to distinguish rules or treaties which may be multilateral and obligations contained therein, which may be bilateral. CRAWFORD uses the term “norm” to refer to the rule or treaty. In this thesis, “norm” refers to the content of an instrument. It could be a rule, but it would not be equivalent to a treaty: a norm would be a rule or obligation contained in the treaty: 6 of mimeo.

²³⁷ *Vienna Convention on the Law of Treaties*, (1980) 1155 UNTS 354.

States.²³⁸ The literature and a number of international decisions provide criteria to assist in the characterisation of agreements as legally binding.²³⁹ Some of these criteria are considered below. At this stage, what is instructive are the distinct attempts at resolving the duel between the form of an agreement and the intensity of its normative content. The attempts consist in three distinct presumptions, and of a denial of the very relevance of legal characterisation.

First, despite official disclaimers of formalism, some authors adopt a distinctly formalist approach. Hence, for WEIL, any agreement that has the *accoutrements* of a formal treaty must be considered to be of a legal character, regardless of the degree of generality of its content.²⁴⁰ Form brings about an “irrebuttable presumption” of legal character, both for the instrument and for its content.²⁴¹ This is somewhat puzzling since treaties need not have any particular form. In practice, however, solemn instruments concluded by Heads of State would qualify. So would, presumably those bearing the official title of treaties as well. In a clearly legal imperialist mode, WEIL seeks to place on the legal side the threshold as many instruments as possible. This conveys a strong belief that law is essential to international stability.

FAWCETT takes the opposite view and posits that “there is no presumption that States, in concluding an international agreement, intend to create legal relations at all [...] this intention must be clearly manifested before a legal character is attributed to the agreement”.²⁴² The degree of specificity of the undertakings is relevant, but hardly determinative. What matters is the explicit – or at least unquestionable – intention to place the agreement in the legal sphere. Paradoxically, FAWCETT then excludes from the domain of legally binding agreements those that setting up “joint administrative or technical arrangements or providing for cultural co-operation”, without any direct reference to the parties’ intention. In other words, he seems to consider that certain undertakings are simply outside the realm of binding agreements and, presumably, that parties could not have intended to bind themselves through such instruments. In any event, the ideological leaning

²³⁸ A.2(1)(a) of the *Vienna Convention* which defines a treaty as “an international agreement concluded between States in written form and governed by international law”. It thus presupposes that all instruments to which it applies are of a legally binding character, without providing criteria to determine when an agreement “is not governed by international law”; WIDDOWS, Kelvin, “What is an agreement in International Law?” (1979) 50 *BYIL* 117-149, 117; EISEMANN, Pierre-Michel, “Le gentlemen’s agreement comme source du droit international”, (1979) *Clunet* 326-348, 340-343.

²³⁹ See notably the *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, [1978] ICJ Rep 3 (par. 96; joint communiqué can constitute a binding international agreement); *Case concerning Maritime Delimitation and Territorial Questions (Qatar v. Bahrain) (Jurisdiction)*, [1994] ICJ Rep 112, paras. 22-41 (signed minutes of a meeting are binding). Those were invoked in the NS-NF arbitration, *supra*: 5.13.

²⁴⁰ WEIL, Prosper, “Towards a relative normativity in international law?”, (1983) 77 *AJIL* 413-442, 433.

²⁴¹ “Présomption irréfragable”: WEIL’s comments on Proposed Resolution, VIRALLY Report, T.I, 370.

²⁴² FAWCETT, J.E., “The Legal Character of International Agreements”, (1953) 30 *BYIL* 381-400, 385.

is clear: States will only be bound if they clearly express their wish to be (and arguably, only on certain matters).

Thirdly, the majority of authors take a mid-way position and maintain that agreements between States should be considered legally binding, unless the parties' intention not to bind themselves in law is clearly demonstrated. This is, for instance, the position defended by GAUTIER,²⁴³ WIDDOWS,²⁴⁴ EISENMANN,²⁴⁵ PELLET,²⁴⁶ MUNCH²⁴⁷ and VIRALLY.²⁴⁸ There is a clear penchant for a legal characterisation, but an openness to the possibility that even with all the trappings of a formal treaty (whatever this may look like), the instrument may be of a purely political character. In any event, if the parties' intention to shield their agreement from the law is explicit, it ought to be respected.

To schematise, authors in the third group consider international agreements to be legally binding instruments until proven otherwise.²⁴⁹ FAWCETT presumes that an agreement between States is "purely political" until proven otherwise. As for WEIL, what appears to be a treaty must be considered as such. Form leads to an irrefutable presumption.

In addition to these three presumptions, which all aim at placing international agreements on the political or the legal side of a threshold, a fourth approach questions the very relevance of that threshold. Hence BAXTER notes that some clearly legal instruments are unenforceable because of the nature of their content. Contrariwise, instruments that cannot be characterised as legal instruments because the parties' intention to maintain them in the political sphere is undeniable, may contain clear and precise undertakings and have a very high degree of effectiveness simply because parties adhere to their word. In other words, "it is excessively simplistic to divide written norms into those that are binding and

²⁴³ GAUTIER, Philippe, *Essai sur la définition des traités entre États : la pratique de la Belgique aux confins du droit des traités*, (Brussels: Bruylant, 1993) 322.

²⁴⁴ WIDDOWS (1979) 139-142.

²⁴⁵ EISENMANN (1979) 344.

²⁴⁶ PELLET, Alain, "Le bon grain et l'ivraie : plaidoyer pour l'ivraie (Remarques sur quelques problèmes de méthode en droit international du développement) ", in *Le droit des peuples à disposer d'eux-mêmes : méthodes d'analyse du droit international: Mélanges offerts à Charles Chaumont*, (Paris: Pedone, 1984) 465-493; DAILLET, Patrick, PELLET, Alain (NGUYEN QUOC DINH), *Droit international public*, 7th ed., (Paris: LGDJ, 2002), 389.

²⁴⁷ MUNCH, Fritz, "Étude exploratoire sur la distinction entre textes internationaux de portée juridique et des textes internationaux dépourvus de portée juridique" in VIRALLY Report, T.I, 307-327, 324.

²⁴⁸ VIRALLY Report, *Final Report*, T.1, 341 ff.

²⁴⁹ This seems to be the approach also taken by LEVRAT concerning trans-border agreements concluded between "sub-state" units: LEVRAT, Nicolas, *Le droit applicable aux accords de coopération transfrontière entre collectivités publiques infra-étatiques*, (Paris: PUF, 1994) 272-274.

those that are not” [as] there is an “infinite variety of ways in which legal norms may reflect different intensities of agreement”.²⁵⁰

This is just another way of recognising the impact of soft law, whether the expression refers to the “soft” nature of certain “hard” legal instruments (such as lofty clauses of formal treaties) or to the “legal” impact of soft instruments (such as the strongly normative content of officially non binding instruments). We return to the issue of the effectiveness of IGAs, regardless of their binding status in the concluding chapter. At this stage, the characterisation of IGAs in positive law implies some form of threshold between the legal and political domains.

4.3.2 Presumptions and re-characterisations of IGAs

As was mentioned above, in the absence of a formal institution of IGAs in Canada, no particular format carries a presumption of legal character. Whether there is a general presumption that IGAs are political until proven otherwise is uncertain.

My working hypothesis was that there was such a presumption. A number of relevant actors certainly share it. These include top civil servants and political staff who negotiate IGAs. Whether courts also share it is difficult to assess. To the extent that older cases sought to assimilate IGAs with private law contracts, it is arguable that most agreements between governments are suspect until they can be “brought down” to something that looks like a private contract. It is also arguable that in certain *obiter dicta* dating from the 1990s, the Supreme Court leaned towards that presumption. On the other hand, in 1976, the Supreme Court recognised, although again *obiter*, that governments could bind themselves through IGAs.²⁵¹ Moreover, when not confronted with the issue head-on, courts do not seem uncomfortable with the idea that IGAs are binding on governments.

In brief, it is unclear whether a FAWCETT-type presumption applies or not. The determination of the binding character of an IGA *inter partes* will therefore rest on an analysis of indicia, perhaps in view of overturning a presumption against legal characterisation.

The situation is, again, more complicated in Belgium. The early Belgian doctrine assimilated IGAs with contract or treaties without considering issues of threshold. This seemed an implicit assumption that agreements concluded pursuant to the newly adopted section 92*bis* were necessarily of legal character *inter partes*. In other words, cooperation agreements were considered as a formal legal source. The normative content did not really

²⁵⁰ BAXTER, R.R., “International Law in ‘Her Infinite Variety’”, (1980) *ICLQ* 549-566, 565-566.

²⁵¹ *Re Anti-Inflation Act*, [1976] 2 SCR 373 [*Anti-Inflation Reference*] 433.

matter to their legal characterisation. This is reminiscent of WEIL's approach to international agreements: if it looks like a treaty (IGA), it is legal in character, and its content is legally binding, even if of a very low normative force.

A less radical solution is to treat formal cooperation agreements as the "third group" of internationalists treat international agreements: they are legal instruments until proven otherwise. A number of criteria could lead to such recharacterisation so as to counter the presumption, including their normative content.

This approach is more compelling. A presumption of legal character makes sense to the extent that section 92*bis* must have modified something to the situation which prevailed until 1988 and in which (pre)federal partners could conclude agreements which were considered merely of political value. This does not imply, however, that every instrument concluded pursuant to s. 92*bis* is necessarily of a legal character. An *in concreto* analysis is also required. This analysis can have three effects.

First, it can simply confirm the presumption that the formal cooperation agreement is a legal instrument, binding *inter partes*. But it can also serve to recharacterise a formal agreement as an agreement with very low normative content - because the undertakings are conditional, discretionary or formulated in vague terms – as a "purely political" protocol. Hence, the Legislative section of the Council of State (CSLS) rendered an opinion on the legality of a proposed legislative instrument giving assent to a framework cooperation agreement outlining in broad terms the wishes of different governments to cooperate in the future.²⁵² For the CSLS, the lack of normative content ("*portée juridique*") of some of the clauses was such that it considered that it lacked jurisdiction to comment on them. It added that this was likely not the type of agreement envisaged by section 92*bis*. This was an implicit form of re-characterisation "down" of a formal cooperation agreement.²⁵³

Conversely, and perhaps more controversially, recourse to indicia of legal status should also allow for the recharacterisation of instruments which are not officially entitled "cooperation agreements" and which do not contain any reference to section 92*bis*, but which serve similar purposes.²⁵⁴ Of course, not every protocol is susceptible of re-characterisation

²⁵² CSLS, opinion on the 30.11.1998 CA between GC and FC: CSLS Doc CRW 1998-1999, 518/1 and MB 08.09.1999, Annexe 2, 11.

²⁵³ Note that the CSLC did not declare itself without jurisdiction over the entire instrument, but only with regards to the woolly clauses.

²⁵⁴ Recharacterisation of other apparently contractual instruments has taken place in Belgium. In section 4.3, we saw that the Council of State had re-characterised collective agreements as regulations. Closer to our concerns, DE ROY has criticised the formalist approach taken to "contrats de gestion" by the Council of State and suggested an *in concreto* analysis, based notably on the nature of the undertakings: DE ROY (2002).

as legally binding. It would have to meet a number of indicia of legal status (as analysed below).

Obviously, the parties' intention to situate their agreement in the legal sphere would be difficult to demonstrate, if an instrument which carries a strong presumption of legal character – as do section 92*bis* agreements – is set aside in favour of a much more indeterminate one. The question then becomes whether parties are absolutely free to conclude agreements that are shielded from the law.

Given the undeniable para-constitutional functions played by IGAs, I would argue that federal partners do not enjoy the unbounded freedom that States have to conclude “purely political” international agreements.²⁵⁵ The limits faced by governments within a federation may have more in common with the public law limitations imposed on private parties in the field of labour or consumer law, than to States. When a legal system includes mechanisms for parliamentary control or judicial review of IGAs, as does the Belgian one, executives should not be allowed to circumvent them by using other instruments that have the same purpose and effect as those subject to controls.

As was argued in the section on the re-characterisation of IGAs as regulatory instruments, this suggests that courts may be entitled to disregard the parties' intention not to be bound in law, when in so doing they are attempting to avoid procedures put in place to ensure parliamentary control or judicial review.²⁵⁶ In other words, a court should be able to re-characterise an agreement despite the parties' intention, if it is in the public interest to do so. Ascertaining what is in the public interest is, of course, difficult, particularly in a dispute between two governments which each claim to represent it. But ensuring that an agreement is subject to parliamentary or judicial review, as provided by law, is certainly in the public interest however conceived, in a State governed by the rule of law. It is, moreover, a proper judicial function.

It should be pointed out that if parties conclude a protocol to avoid submitting a formal cooperation agreement to legislative assent, a re-characterisation may result in a legal instrument rather than a “purely political” one, but one that is invalid for violating section

²⁵⁵ By not using anything that looks like a treaty for WEIL, by stating their lack of intention to be bound at law for the “third group” and arguably, by doing nothing, for FAWCETT.

²⁵⁶ See discussion above, section 4.3.3 on the re-characterisation of ministerial circulars as regulatory instruments.

92bis.²⁵⁷ The practical interest may be limited to the not altogether insignificant message that governments are bound by rules of public law, even in their *inter partes* dealings.²⁵⁸

The foregoing may be somewhat abstract, given the limited likelihood that a party to a protocol would even attempt to have it characterised as a binding instrument. The situation is not inconceivable, however. This could occur, for instance, following a change of government.

4.3.3 Indicia of legal status

Assessing the status of IGAs *inter partes* thus requires an exercise of characterisation which can confirm or overturn a presumption. Scattered clues can be gleaned in Canadian and Belgian cases, not in any systematic fashion.

As was mentioned earlier, every body of law in which agreements are concluded has sought a test for distinguishing between those with and those without legal character. The following “indicia of legal status”,²⁵⁹ taken in combination, can lead to a conclusion that a particular agreement is binding *inter partes* as a contractual instrument in the Canadian and in the Belgian contexts. This non-exhaustive list is derived from a variety of sources, with adjustments that take into account the public law of each federal system. In addition to the limited indicia provided in the Canadian case law, these sources include tests proposed to distinguish treaties from international agreements devoid of legal character,²⁶⁰ gentlemen’s agreements from binding private contracts,²⁶¹ and the limited literature on tests to distinguish IGAs of a legal character from those that do not cross the threshold of juridicity.²⁶²

Before turning to these indicia, however, the issue of intention must be briefly revisited. Intention or consent to make a commitment is - by definition - essential to the concept of agreement. Whether the “meeting of wills/minds” paradigm ever truly applied in

²⁵⁷ Which, it will be recalled, requires that agreements which impose obligations on third parties, thread on the domain of the legislative branch, or have financial implications, receive legislative assent.

²⁵⁸ The same is true of the re-characterisation of any instrument – including an IGA – as a regulatory one, which is then considered invalid because it was not submitted to the legislative section of the Council of State: *supra*, 4.3.3.2.

²⁵⁹ The expression is borrowed from KENNETT (1993) 656.

²⁶⁰ WIDDOWS (1979) 137 ff; FAWCETT (1953) 388-91; BAXTER (1980) 552 ff; DAILLET and PELLET (2002) 388-389; EISEMANN (1979) 343.

²⁶¹ DIRIX, E., “Le ‘Gentlemen’s Agreement’ dans la théorie du droit et la pratique contemporaine”, (1999) 76 *RDIDC* 224-245; LEFEBVRE, Brigitte, “Le ‘gentlemen’s agreement’: aspects théoriques et pratiques”, in Association canadienne de droit comparé, *Droit contemporain 1998*, (Cowansville: Yvon Blais, 1999) 91-99; ALLEN, David, “The Gentleman’s Agreement in Legal Theory and in Modern Practice”, (2000) 29 *Anglo-American LR* 204-227.

²⁶² KENNETT (1993) 655 ff.; BLACKMAN (1993) 7-19 and 40 ff.; GARCIA MORALES (1998) 111-131. The first two in the Canadian context, the last one drawing on Swiss and German case law.

private law, and regardless of the supreme role played by the intention of States in the consensual international legal order,²⁶³ it is clear that federal partners do not enjoy the same unbounded freedom to consent to bind themselves in law.

First, as we saw, a number of public law impediments can preclude the legal characterisation of an agreement regardless of the parties' intention. Secondly, I have also questioned whether federal partners were free to conclude "purely political" agreements that have the same object as formal cooperation agreements but are meant to be shielded from a number of parliamentary or judicial controls. The re-characterisation of protocols would likely counter the parties' intention. This is possible in Belgium, where a formal institution of cooperation agreement exists, with a number of rules of public law concerning IGAs. However desirable such rules may be, they simply do not exist in the Canadian context. In other words, the parties' intention to conclude "purely political agreements" is less restrained under Canadian than under Belgian public law. It remains a central element in both, however.

The parties' intention not to bind themselves can be expressed in the text, which may direct that it is "binding in honour only".²⁶⁴ Such explicit denial of legal status is exceptional, in every field of law. They are extremely rare in the context of IGAs in Canada, with the exception of agreements concerning negotiations regarding self-government with aboriginals, for instance.²⁶⁵ I have not seen any such disclaimers in Belgium.

In fact, parties are rarely unequivocal about their intentions to create – or to avoid – legal relations.²⁶⁶ For one thing, parties may simply never turn their mind to the question, focused on reaching an agreement on a particular policy issue. They may even have deliberately chosen to remain vague in order not to clearly place the instrument in the legal or purely political domain. Reaching an agreement on substance may have been at the cost of this vagueness.

²⁶³ After a variety of fates reserved by various Reports, the criteria of the parties' intention was removed from the clause concerning the scope of the Vienna Convention, notably on grounds that it was implicit in the expression "international agreement": WIDDOWS (1979) 136. See however, fn 45 of the NS-NF Arbitration (Phase I), which suggests that the intention to be bound under international law may not actually be required for a treaty. This said, the element of intention is recurrent in the sentence: see for instance, par. 4.16, 4.21, 5.1 and 7.3. It will be recalled that the Arbitration Tribunal was directed to assess the existence of an inter-provincial IGA, as if the issue were governed by international law.

²⁶⁴ BLACKMAN (1993, 10, fn16) gives an example of a Statement of Principles relative to an Alberta Oil Sands Project which explicitly provided that it "is not intended to and does not create legally enforceable rights and obligations".

²⁶⁵ Accord politique pour l'examen d'une forme de gouvernement au Nunavik par l'institution d'une Commission du Nunavik (FED + QC + Nunavik), 05.11.1999 (SAIC 1999-033).

²⁶⁶ BLACKMAN (1993) 9. In *Banque nationale du Canada v. C.S.R. de Tilly*, 1990 RJQ 1536, 1538 (CAQ), the Québec Court of Appeal insisted on the importance of assessing the parties' intention, even though it is often "hazy" (*brumeuse*).

The parties' intention thus generally needs to be inferred from some objective factors. Reconstructing an allegedly common "intention" *a posteriori* can be a hazardous endeavour and attributing an intention to collective bodies such as members of a federation poses a particular difficulty. This is, however, a common quandary in the case of international treaties or commercial contracts concluded by multinationals. The parties' intention is largely assessed "objectively", by looking at what parties wrote and did – when this intention is not expressed, courts may simply imply terms that they consider reasonable.²⁶⁷ Finally, courts may impute an intention on parties, as a mask for what I described above as factors precluding binding status.²⁶⁸

We can now turn to the indicia of contractual character, which revolve around content, form, the parties' behaviour and the impact of dispute resolution mechanisms.

4.3.3.1 Content as indicia

Subject matter: In both federations, there are, as we saw, *ratione materiae* limitations to the conclusion of IGAs of a legal character. In Belgium, the concern is mostly with agreements that would imply an abdication or a transfer of constitutional competences. Section 92*bis*, has, however, apparently lifted limitations against abdicating "freedom of executive initiative" to the extent that it does not imply an abdication of competences. As we saw, the line between the permissible and the prohibited is difficult to draw. In Canada, the validity of agreements which derogate from the formal distribution of competences is, as we saw, uncertain, to the extent that there is no direct transfer of legislative power.

Concretely, this suggests that in both countries arrangements to co-manage a project over which each partner has constitutional competence and which does not imply the abandonment of authority – even temporarily – in favour of another party, are more likely to

²⁶⁷ MARSCH, P.D., *Comparative contract law: England, France, Germany* (Aldershot: Gower, 1994) 22. In a recent case on tendering, the Supreme Court of Canada opted for a subjective approach, noting that the determination of the parties' intentions must focus on the actual intention of the parties, and that a court "must be careful not to slide into determining intention of reasonable parties". It then concluded that given the facts, it was "reasonable" to imply a particular term and "reasonable" to infer that the respondent would only accept compliant tenders. The subjective test is thus infused with objective assessment: *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] SCR 619, 635.

²⁶⁸ For instance, instead of basing a decision on the rule against fettering, the Privy Council held that it was unreasonable to construe a contract between Ottawa, British Columbia and a railway company as binding in perpetuity *BC v. Esquimalt and Nanaimo Railway Co.*, [1950] AC 87 (PC), rev'g [1948] SCR 403 (the SCC had taken the opposite approach in *R. v. Dominion of Can. Postage Stamp Vending Co.*, [1930] SCR 500). In the *Railway Standardisation* case *supra*, 4.1.3, two judges denied that the parties could have had the intention of binding themselves in law through the impugned IGA, when, fundamentally, their objection rested with the nature of the undertakings, which they did not consider proper contractual material: 148-149 (McThiernen J.) and 153-154 (Windeyer J.).

be qualified as creating legally binding obligations, than an IGA with clear para-constitutional functions.

Agreements with financial implications must be examined through two angles. As channels for spending by one order of government in an area over which it has no constitutional competence they would constitute an inadmissible violation of the distribution of powers in Belgium, while, as we saw, the impact is uncertain in Canada.²⁶⁹ However, funds invested as an exercise of proper constitutional competences would constitute a good indicia of legal character. In Canada, the closer an IGA comes to a commercial arrangement, the more likely it will be considered legally binding. In Belgium, such an IGA could be re-characterised as a “civil law” contract.²⁷⁰

Precise undertakings: Agreements couched in exhortatory language, or which are conditional on external factors, or even more on factors over which parties themselves have a degree of control, are less likely to be qualified as legally binding. However, in the Belgian case the weight of such a factor differs if the undertaking is included in a formal section 92*bis* agreement, or if it is included in a protocol. In general, framework agreements are less likely to give rise to legally binding obligations than specific agreements to which they give rise.²⁷¹ This is just an application of the principle that obligations contained in contracts must be precise and possible.

Consideration: Historically, the common law would only enforce promises for which something in return was granted.²⁷² While the formalistic requirement concerning “consideration” has been loosened over the years, language referring to consideration may indicate an intention to create legal relations.²⁷³ It seems highly unlikely that a court would deny legal character to an IGA on those grounds today, but it cannot be entirely excluded. Consideration is of course irrelevant in the Belgian case, or with regards to IGAs concluded between Ottawa and Québec.²⁷⁴

²⁶⁹ *Supra*, 4.2.1.2. and 4.2.2.2.

²⁷⁰ Or remain an IGA, but fall under the jurisdiction of ordinary courts, as do civil contracts: *supra*, 4.2.2.2.

²⁷¹ BLACKMAN (1993) 13.

²⁷² ATIYAH, P.S., *An introduction to the Law of Contract*, 5th ed. (Oxford: Clarendon Press, 1995) 117.

²⁷³ Of all authors writing on IGAs in Canada, only CULAT lists it amongst conditions of validity of IGAs, but notes that a seal could serve the purpose. Such formalities are extremely rare in practice (if ever used): CULAT, Didier, *Les ententes intergouvernementales: nature juridique, considérations constitutionnelles et règlement des différends*, étude préparée pour le Secrétariat aux affaires intergouvernementales canadiennes, Québec, 1990, 33-34.

²⁷⁴ Unless one were to assume that an IGA, because of its “public” nature, is governed, even in Québec, by the common law and not the civil law. Such an assumption seems quite improbable, notably because it is unclear which common law would apply in this case, since there is no “federal common law” in Canada. The esoteric civilian “cause” (which goes to purpose rather than bargain) could theoretically be used to defeat some violation of public law rules, although its use to defeat the parties’ intention is extremely rare: MARSCH (1994) 103-104.

Specific clauses: “Coming into force” clauses would appear to be neutral, unless they indicate a date at which a specific legal situation is to change. By contrast, termination clauses, which underline that parties can alter the agreement by consent, or failing which after a specified notice period signal that parties agree not to renege on their undertakings unilaterally.

Particular clauses can also provide clues to the status of an IGA. For instance, a clause providing that the annulment or non-application of a part of the agreement does not affect the remainder is a good indication that it is meant to bind the parties.²⁷⁵ Similarly, undertakings by a party to indemnify another one for services rendered, or in case of damages, are suggestive of legal character.²⁷⁶

4.3.3.2 Form as indicia

Title: In Belgium, the “cooperation agreement” label probably has the same impact as the use of “treaty” in public international law.²⁷⁷ It is not determinative, but creates a stronger presumption of legal character than terms such as “protocol”. The term “convention” is particularly ambivalent, as it refers both to a civil law contract, and to what parties obviously consider as a non-legally binding agreement. In Canada, nearly forty different labels have been given to IGAs in both French and English. In the absence of one formal term that carries a presumption of legal character, the designation of an IGA in Canada is not a strong indicia of status, although, again, a “loan agreement” is more suggestive of legal character than a “letter of cooperation”.

Language used: There are no standard rules of drafting IGAs, or even guidelines for civil servants, most of whom have no legal training. Consequently, drafting style must be used with caution as an indicator of legal status. As a general rule, the use of the verb “shall” - by opposition to “will” - connotes a legal undertaking. In French, this distinction is reflected in the use of the present as opposed to the future tense.²⁷⁸ This, however, is only a rough

²⁷⁵ Agreement Respecting Legal Aid in Criminal Law Matters and in Matters Relating to the Young Offenders Act (FED + AB) 01.04.1996, s.21(2).

²⁷⁶ Entente entre le gouvernement du Québec et le gouvernement du Canada concernant la présence d’une représentation économique en République populaire de Chine au sein de la mission diplomatique canadienne à Beijing, 01.08.1998 (SAIC 1998-023); Accord de coopération relatif à la problématique des transports scolaires entre le Gouvernement de la Communauté française et le Gouvernement de la Région Wallonne (Fr C + WR), 25.05.98 (15.07.99).

²⁷⁷ According to art.1(a) of the *Vienna Convention on the Law of Treaties*, the formal designation that parties have chosen for an instrument is irrelevant to its formal status.

²⁷⁸ Interestingly, GAUTIER (1993) 365, 469, discusses the “shall/will” distinction, but does not mention the equivalent distinction in French (present/futur), which suggests that this distinction is not generally seen as relevant in Belgium. Nor does he mention the potential distinction in Dutch.

guideline.²⁷⁹ It is not rare, for instance, for the terms “shall” and “will” both to be translated into the present tense in the French version of an IGA. Legal jargon such as indemnification, responsibility are – logically – also indicative of legal undertakings.

Signature: A signature is no clear indication that parties intend to be bound in law. The absence of signature, however, could signal a lack on intention to bind. But it may also simply result from bureaucratic error. It is not unusual for government to be unable to locate a properly signed copy of an IGA. Again, this is the type of indicia that can only be understood in context.²⁸⁰

Format: As we saw, Belgian IGAs bearing the title of “cooperation agreement”, referring explicitly to section 92*bis*, including recital of constitutional provisions and signed by Ministers, carry a strong presumption of juridicity. The more an agreement moves away from traditional form, however, the more likely its content is to play a determinative role in the qualification of the instrument.²⁸¹ In the absence of a typical format in Canada, presentation is largely irrelevant.

Domestic formalities: The failure to submit an IGA to cabinet for approval, or to obtain a legally required signature may deprive an IGA of validity in the legal order in which it was required. It is not obvious that it would deny legally binding character to the IGAs *inter partes*.²⁸² This being said, failure to comply with a prescribed formality may be evidence of the absence of intention to conclude a binding agreement. Of course, the good faith of a government that concludes an agreement, then fails to follow the proper procedure for ensuring its validity, would be called into question. Were the IGA held not to be binding, courts may nevertheless circumvent the problem by resorting to other legal doctrines such as estoppel, legitimate expectation, good faith or federal loyalty.²⁸³ In Belgium, failure to obtain legislative assent regarding agreements that impose financial obligations, bind third parties or deal with matters reserved to the legislative branch could not be characterised as legal instruments, even *inter partes*.

²⁷⁹ For instance, in the Alberta-Canada agreement of 1973, the verb “will” was interpreted as compulsory: *supra*, 4.1.3. By contrast, in *Secunda Marine Services Ltd v. Canada*, 2003 NSSC 2 (canlii), par. 24, the verb “shall” was interpreted indicative of an intention of policy.

²⁸⁰ Hence, the Federal Court carefully avoided characterising an unsigned IGA but still made rulings on its constitutionality: the *Contravention case*: *supra*, 4.1.3.

²⁸¹ GAUTIER (1993, 356) makes a similar argument with regards to international agreements.

²⁸² A parallel could potentially be drawn with art.46 of the *Vienna Convention of the Law of Treaties*, although, of course, federal partners have never expressly endorsed such a rule. In fact, some provisions in provincial Acts regarding authority to conclude would suggest the opposite: *supra*, 4.1.2.1.

²⁸³ *Infra*, section 4.4.

External formalities: The binding character of an IGA may depend on some external factor or formality over which parties have no control. In this case, the IGA could be understood as legal in character, but under a suspensive condition. If, however, the parties can exert some influence over the realisation of that external condition, it is arguable that an IGA would lack legal character until they take necessary steps to ensure its realisation.²⁸⁴

Publication: There are no legal requirements concerning the publication of IGAs in either federation.²⁸⁵ While publicity is essential to bind third parties, it is not a factor determining legal character *inter partes*. Inclusion in registries would not appear to be either, although in Belgium protocols are not listed in the central registry.²⁸⁶ In Canada, inclusion in the federal registry is not indicative of legal status, since it is informal, and grounded on policy concerns rather than legal ones.²⁸⁷ In Québec, there is a legal obligation to keep IGAs to which the province is party, but since this applies to every type of IGA, the inclusion is also of little assistance.

4.3.3.3 The parties' behaviour

The Parties' behaviour prior or following the conclusion of an IGA is another indicator of legal character. This would be the case, for instance, if the parties treated or referred to the IGA as binding in their subsequent dealings, or in relation to third parties.²⁸⁸ A party's actual reliance on an IGA may have distinct legal effects. It may call for the application of the doctrines of estoppel or legitimate expectation, which give some remedy without actually characterising an IGA as a legal instrument.²⁸⁹ In other cases, reliance by one party could tilt the balance in favour of legal characterisation of an instrument of otherwise doubtful status.

4.3.3.4 Dispute resolution provisions

Another indicator of the parties' intentions to bind themselves in law - or not - is the express provision of dispute resolution mechanisms (DRM). These take a number of forms, and raise distinct problems in the two federations. The Canadian case will be examined first.

²⁸⁴ NS-NF Arbitration: since any agreement concerning a boundary would have required federal approval, failure to submit an alleged IGA to federal authorities indicated a lack of intention to conclude a final and binding IGA.

²⁸⁵ *Supra*, 2.2.1.5 and 2.2.2.5.

²⁸⁶ Those with financial implications are annexed to Acts regarding budget approval, however.

²⁸⁷ I would argue the same applies to the Québec registry.

²⁸⁸ NS-NF Arbitration, par. 6.1-6.9.

²⁸⁹ *Infra*: 4.4. Detrimental reliance does not, *per se*, modify the status of an IGA, although, in the common law, it tends to be analysed as part of the law of contracts since it can, however, lead to remedies similar to those awarded for breach of contract: WADDAMS (1999) 141-149.

In a significant number of agreements, parties undertake to resolve their disputes through negotiation, by submitting them to a joint committee or to a political body or meeting (Ministers, for example). Hence, of the 880 IGAs available in full-text in the federal registry, 240 contain explicit “dispute resolution” clauses, the vast majority of which refer to management committees or other non-judicial organs. This does not necessarily exclude eventual recourse to a court of law, though it may do so. Sometimes “alternative” dispute resolution mechanisms simply take precedence over judicial solutions. Sometimes they oust them.²⁹⁰ The precise drafting of the clauses must be analysed in light of all the other indicia.

Some agreements specifically envisage the creation of arbitration tribunals for dispute resolution. Of the 240 explicit DRM clauses, 84 specifically provide expressly for resolution of disputes by the Federal Court.²⁹¹ A lesser number refer to provincial Superior Courts.²⁹² These two solutions have a potentially distinct impact on the need to clarify the legal character of IGAs.

Indeed, as a rule, the Federal Court does not have jurisdiction over the provinces and it could normally not entertain a dispute concerning a federal-provincial IGA.²⁹³ By exception to this rule, section 19 of the *Federal Court Act* provides that provincial consent – through legislation- can confer the Trial Division jurisdiction to resolve “controversies” between Canada and that province, or even between two provinces.²⁹⁴ This is an attempt to palliate the largely dual nature of the Canadian judicial system in which federal and provincial orders have their own judicial institutions. In this quality, the Federal Court acts as a sort of inter-federal arbitration tribunal.²⁹⁵ It thus acts as some sort of equivalent to Belgian cooperation tribunals.

²⁹⁰ In *Ontario (Chicken Producer's Marketing Board) v. Canada (Chicken Marketing Agency)*, [1993] 1 FC 116 (FCTD), holding governments could not exclude the FC's jurisdiction through an IGA (this was jurisdiction in judicial review, however, not regarding a dispute *inter partes*). See also: *Secunda case*, in which the Court ruled that an IGA including clauses concerning courts of competent jurisdiction was simply a “statement of policy”, therefore common rules of jurisdiction apply.

²⁹¹ Camp Hill Transfer Agreement, 08.05.1978, am. 21.03.1983 and 31.01.1992 (NS00141), s.36.

²⁹² The precise number is difficult to assess through a key word search because of the distinct names borne by the various provincial courts.

²⁹³ The Federal Court's jurisdiction is statutory and exceptional, by contrast with the inherent jurisdiction of provincial Superior Courts: SGAYIAS, David et al., *Federal Court Practice* (Toronto/Montréal: Carswell, 2002) 6-16.

²⁹⁴ Federal Court Act, RSC, 1985, c. F-7, s.19. There may be doubts concerning the constitutionality of that section, since the Federal Court only has attributed jurisdiction, which does not extend to provincial matters: HOGG and MONAHAN (2000) 362-363; BLACKMAN (1993) 46; LAJOIE (1984) 176-181.

²⁹⁵ Only governments can seize the Court pursuant to that section: *Union Oil Co. of Can. Ltd. v. R.*, [1974] 2 FC 452 ; aff., [1976] 1 FC 74 (FCA); aff. [1976] 2 SCR v.; *Lubicon Lake Band v. R.*, [1981] 2 FC 317 (TD), aff. (1981), 13 DLR (4th) 159 (FCA); *Fairford Band v. Canada (A.G.)*, [1995] 3 FC 165; aff. as *Fairford First Nation et al. v. Canada* (1996), 205 NR 380 (FCA).

A number of decisions concerning IGAs examined earlier were actually rendered by the Federal Court pursuant to this section.²⁹⁶ The Court has ruled that “controversies” must be resolved through recourse to some legal rule or principle (in other words, it does not act as a political organ, or simply render decisions that seem fair in the context).²⁹⁷ It has not, however, been rigid concerning the characterisation of instruments that give rise to a controversy.²⁹⁸

Similarly, specific provision for arbitration seems to avoid concerns about the legal characterisation of an IGA.²⁹⁹ Hence, the arbitrators in the Tax Rental Agreement case did not concern themselves with the legal character of the IGA at stake. That its subject matter probably precludes it from being legally binding *inter partes* was not considered an obstacle to the resolution of the dispute.

By contrast, a regular court of law would likely start by characterising the IGA as a legal instrument before undertaking to enforce it. In other words, there would be a preliminary stage, at which the court would rule on its own jurisdiction to resolve a dispute *inter partes* concerning the interpretation or implementation of the IGA. When the court or tribunal’s jurisdiction is not at issue, the IGA’s character is less problematic. Courts or analysts in Canada have not noted this distinction. Interestingly, certain federal-provincial IGAs refer disputes to the Federal Court, while others, on the same subject but concluded with other provinces, refer them to provincial Superior Courts.³⁰⁰ The latter would arguably have to proceed with a stricter characterisation process than the former.

The status of IGAs providing for complex dispute resolution mechanisms that expressly bar ordinary courts is particularly puzzling. Hence, the Canadian Internal Trade Agreement (ITA) contains a detailed dispute resolution system, which excludes binding legal solutions, except with regards to certain constitutional issues or the judicial review of certain actions by public officials.³⁰¹ The status *inter partes* of such IGAs is particularly difficult to pin

²⁹⁶ The 1978 *PEI ferry case* (which dealt with a constitutionalised IGA); the 1983 decision concerning the 1973 Ottawa-Alberta agreement; and three of the pre-war cases: the *Precious Metal* case, the *Objibway* case and the *Interest Rate* case: *supra*, 4.1.3

²⁹⁷ 1910 *Objibway* case, 109-112; 1978 *PEI Ferry* case, 558.

²⁹⁸ For instance, it held that s.19 allows it to consider an agreement which otherwise could be considered inchoate: *PEI Ferry case* 1978, 588.

²⁹⁹ Unless, of course, the arbitration is aimed at establishing whether such an IGA exists, as in the NF-NS arbitration sentence.

³⁰⁰ Most bilateral agreements concerning legal aid for young offenders provide that ultimate dispute resolution can be sought before the Federal Court or the Superior Court of the Province. In the case of Québec, only the Superior Court is mentioned. Compare: Agreement Respecting Legal Aid in Criminal Law Matters and in Matters Relating to the Young Offenders Act, 01.04.1996 (AB01348) s. 22(2) and same provision in similar federal-Québec agreement (QC01398).

³⁰¹ Ss. 1711-1720 of ITA. The constitutionality of retaliatory action may be submitted to a court of law: s.1710(10).

down.³⁰² As in the case of the Federal Court acting pursuant to section 19, or specific arbitration tribunals, panels do not require to assess the legal character of the ITA to resolve disputes concerning its interpretation or implementation. The referral to third parties to resolve disputes excludes a simplistic “purely political” characterisation. The fact that the panel decisions are not binding excludes a classic “legal” characterisation.

In agreeing to such DRMs, governments form a parallel legal structure, which borrows from legal pluralism. This is striking, since normally, legal pluralism refers to legal systems that exist in parallel to the official “state” legal system.³⁰³

Similar questions arise in Belgium, given that the majority of optional cooperation agreements do not provide for dispute resolution by cooperation tribunals,³⁰⁴ although a large number create management committees and some specifically set up panels of civil servants to resolve disputes. Such arrangements do not exclude the possibility that a formal cooperation tribunal could eventually be seized of a dispute, if parties so chose, but in the meantime, there is a clear desire to maintain dispute resolution as an inter-governmental affair. There are no examples, similar to the Canadian ITA in which governments agree to submit to third party arbitrators, apart from formal cooperation tribunals. There would be no need to do so.

Such interrogations raise fundamental issues of legal theory, which are beyond the scope of this thesis. They question the “meaning of law” both in the sense of the definition of “legal character” (does it necessarily imply enforceability?) and in the sense of the practical interest of the whole exercise of characterisation (what is the relevance of law in this context if parties resolve their disputes otherwise?). To conveniently dodge the first aspect, it can be pointed out that public law knows of a number of unenforceable norms that are nevertheless of a legal character.³⁰⁵ The second aspect is partly addressed in the Final Conclusions.

In sum, dispute resolution mechanism is a complex indicia legal character. Explicit provision in an IGA regarding the submission of disputes to external neutral parties is a good indicator of legal character. This is the case, for instance, of references to the Federal Court

³⁰² On the impact *erga omnes* of the ITA: *infra*, 5.2.2.3 and 5.3.2 (discussion concerning the “*Colour of Margarine case*”).

³⁰³ Legal pluralism “challenge[s] the supposed monopoly of the State as the sole source of normativity”: NOREAU, Pierre, ARNAUD, André-Jean, “The Sociology of Law in France: Trends and Paradigms”, (1998) 25 *Journal of Law and Society* 257-283, 274.

³⁰⁴ It will be recalled that pursuant to s.92bis(5)(6), these tribunals have jurisdiction over compulsory agreements and that ordinary courts would be competent regarding “civil law” clauses contained in any form of agreement: *supra*, 4.1.2.2.

³⁰⁵ This is the case of constitutional conventions in Canada (*infra*, 6.3.2.2), the protection of social and economic rights pursuant to s.23 of the Belgian *Constitution*. The absence of enforceability of legal

under section 19 or to arbitration, although these organs may not need to qualify the instrument in order to set about to resolve a dispute. The same would be true of express submission to *ad hoc* tribunals in Belgium. If a Canadian IGA provides for submission to an “ordinary court”, the indicator of legal character becomes very strong.³⁰⁶ Finally, submitting an IGA to a complex external DRM, that is not a classic judicial or arbitration one suggests a mid-way approach: neither purely political, neither classically legal. Such scenarios are probably better understood from the angle of legal pluralism. While Belgian cooperation tribunals are officially courts of law, their arbitration character is undeniable. Moreover, the option enjoyed by governments to circumvent these courts of law altogether, even if an agreement met every other indicia of legal character

4.3.4 Thresholds and binding force

The logical consequence of any *in concreto* analysis of IGA as a contractual instrument is that the focus should be on what parties have actually agreed upon, rather than on the format in which they framed their undertakings.³⁰⁷ To use the cargo and vehicle metaphor developed earlier, what matters in the end is the cargo.³⁰⁸

Of course, the *in concreto* characterisation of the vehicle requires an assessment of its cargo. As we saw, the correspondence between the type of undertakings, notably their degree of specificity, and an IGA’s character is probably closer in Canada than in Belgium, where the presumption of juridicity attached to formal cooperation agreement arguably lowers the “content” requirement.

Conversely, determining whether a particular clause contained in an IGA is legally binding would partly depend on the characterisation of the vehicle as a legally-binding instrument. Hence, if a court were to determine that the instrument is “purely political” because the parties’ intention is undeniable and ought not to be ignored, no degree of specificity of the undertaking would make it legally binding. Faced with an ambiguous clause however, a judge may be more inclined to consider it to be legally binding if it is contained in an otherwise clearly binding instrument. Finally, an instrument characterised as having binding contractual value, may nevertheless contain certain clauses lacking normative force. This would notably be the case of “mixed” agreements that contain both legally binding and

norms is the rule in public international law: VERHOEVEN, Joe, *Droit international public* (Brussels: Larcier, 2000) 21-24.

³⁰⁶ Although in Belgium, this would lead to a recharacterisation as a civil law contract, which, of course, is legally binding.

³⁰⁷ In the *Railway Standardisation case*, Dixon J. insisted on the need to focus on the actual undertakings contained in agreement, rather than to seek to characterise the entire instrument itself (at 148).

³⁰⁸ *Supra*, 4.2.2.

non-legally binding undertakings.³⁰⁹ Arguably, given the presumption of juridicity in Belgium, the likelihood that an agreement containing such woolly clauses is nevertheless considered to be of legal character may be higher.

This suggests that while setting a threshold and determining on which side a particular instrument falls may be essential in positive law, it is not sufficient. For even when the border is traced, through recourse to a number of indicia, the matter of “normative content” reappears. On either side of the threshold there can be degrees of normativity. Put another way, even when the threshold is set (following the on-off metaphor), there can be a gradation in the intensity of the obligations (more like a dimmer switch).

This is true on the “non legal” side of the threshold. Parties could make very specific undertakings in IGAs held to be “purely political”. This is a reflection of the soft law impact of “purely political” instruments. More significantly for our purposes, this gradation exists also on the “legal side of the threshold. Some undertakings are simply more “binding” than others.³¹⁰ In Belgium, those would be on the far end of the legal category, close to the threshold. In Canada, those would probably not even make it into the “legal” category.

4.4 The legal effect of IGAs which do not constitute contractual instruments

Intergovernmental agreements that do not qualify as contractual instruments may nevertheless have certain legal “effect”. For one thing, they can assist judges in their interpretation of legal norms adopted to give effect to IGAs.³¹¹ Judges clearly consider them relevant. We saw for instance that when the status of an IGA is not the direct object of a dispute, courts will generally discuss them without questioning their legal character, to assist in the interpretation of other norms.³¹²

There is another sense, however, in which agreements which do not qualify as binding instruments can have legal effect. In every field of law in which thresholds of juridicity are meant to distinguish binding from non-binding agreements, legal doctrines have the potential of affording some legal protection to parties who relied on the representation made through the agreement, or the promises it contains, even if those are embodied in texts which do not cross that threshold. This could be for a number of reasons, some technical

³⁰⁹ MOORE (1935) 187 refers to those as “mixed agreements”; VIRALLY Report, *Final Resolution*, 4(2) T.II, 289.

³¹⁰ As BAXTER (1980) argues is the case of treaties: *supra*, 4.3.1.

³¹¹ *Canada Post v. Smith*, ONCA c.24323 (CAO); by analogy, the Supreme Court of Canada has used international instruments to assist in the interpretation of domestic legislation: *Schavernoch v. Foreign Claims Commission*, [1982] 1 SCR 1092.

³¹² *Supra*, 4.1.3 and 4.2.4. See also *infra*: 5.3.

(lack of proper authority), others related to the impossibility of ascertaining a common intention to create legally binding obligations.

The common law doctrines of detrimental reliance, estoppel, legitimate expectations or restitution, or the continental ones of “reasonable expectations” “good administration”, the “parallelism of formalities” or unjust enrichment find their source in private or administrative law. Some have also been applied in the international law context. It is worth reflecting on the possibility that – by analogy – they could give legal effect to IGAs actually deprived of legal character.

This simple enumeration illustrates the diversity of those devices and the challenge of comparing them. The first difficulty is one of definition and vocabulary. Many of these doctrines are similar but bear different names. This is an area replete with “*faux amis*”. To give a few examples, “reasonable expectations” is a private law doctrine in Belgium,³¹³ its administrative equivalent being the principle of “*good administration*”.³¹⁴ In the common law, the latter is generally described as “legitimate expectations”.³¹⁵ The common law doctrine of estoppel³¹⁶ would find some equivalent in the “parallelism of formalities”³¹⁷ and simply good faith in Belgium.³¹⁸ While estoppel in the context of international law generally implies some form of prejudice on the part of the person or body that relied of some representation.³¹⁹ In the common law, this could be described as detrimental reliance.³²⁰

The scope of this thesis does permit an incursion into the various distinctions between all these techniques. Nor is it possible to review the potentially distinct judicial and doctrinal treatment they have received in Canada and in Belgium, in contexts other than those relating to IGAs. For it must be pointed out that, apart from a very particular angle

³¹³ DIEUX (1995).

³¹⁴ MAST (1989) 40-41 describes it as a general principle of law which incorporates notably legal security and the guarantee against arbitrariness. The expression “*confiance légitime*” is also used, although less frequently : ERGEC, Rusen, “Le principe de la légalité à l’épreuve des principes de bonne administration”, obs. Cass 04.09.1995 (1998) 52 *RCJB* 5-25, 20. For a common law plea for an application of this principle: CLAYTON, Richard, “Legitimate Expectations, Policy and the Principle of Consistency”, (2003) 62 *Cam LJ* 93-105, 104.

³¹⁵ LE SUEUR, Andrew et al., *Principles of Public Law*, 2nd ed. (London/Sydney: Cavendish Publishing, 1999) 287.

³¹⁶ WADDAMS (1999) 141-149; ATIYAH (1995) 145-149.

³¹⁷ This Belgian doctrine provides that when a formality was used to adopt a particular act, its repeal requires similar formalities. A version of it implies that the revocation of a particular decision must be made by the same authority that made the original one: FLAMME, t.I (1989) 361; FAVRESSE (1993-94) 144: *infra*, 6.3.1.1.

³¹⁸ Van OMMEFLAGHE (1987).

³¹⁹ SALMON, Jean (dir.), *Dictionnaire de droit international public* (Brussels: Bruylant, 2001) 450-451 ; Le SUEUR (1999) 290.

³²⁰ WADDAMS (1999) 476-477.

from which legitimate expectations was argued in the *CAP Reference*,³²¹ none of these have been litigated in either Belgium or Canada in the context of a dispute *inter partes* concerning the violation of an IGA.³²²

These doctrines all share a common underlying principle, that the law should require public authorities to keep their promises and respect the representation that may have induced others to rely on them, even when those are not embodied in a formal legal text. The following only suggests elementary reflection on their potential application to disputes *inter partes* regarding an IGA.

The following assertion, made in the context of “ordinary” government contracts, illustrates the interrelation between these various doctrines. WADDAMS notes that given the governments’ increasing role in social and economic activities:

“(i)t would seem desirable that the government should be bound by the ordinary *law of contracts*, including the law relating to *estoppel*, for the alternative is to *allow it to profit* by disappointing the *reasonable expectations* of the citizen.”³²³

This statement thus brings together the notions of unjust enrichment, legitimate expectations, estoppel and the law of contract.

Of all these, the least controversial is probably unjust enrichment or its equivalent.³²⁴ If a government has benefited from an IGA that turns out not to be of legal character after all, and fails to carry out its part of the deal, a convincing plea could be made that the benefit should at least be repaid. Similarly, detrimental reliance (or some equivalent) could compensate for quantifiable loss incurred by a party to a non-binding IGA by reason of it having acted on the basis that the other party would abide by their agreement.

Estoppel may provide another judicial solution.³²⁵ The term, however, has several meanings, as was suggested above. In his 1982 Report to the Institute of International Law

³²¹ This is examined *infra*, Chapter 6, because the argument was made to preclude legislation that was contrary to a complex cooperative scheme involving an IGA. It is analysed through the prism of the hierarchy of norms.

³²² Although, this may have been what some judges of the Australian High Court had in mind in the *Railway Standardisation case*: Dixon at 141 Windeyer J, at 155 and Menzies at 150. See also NS-NF Arbitration (Phase I), par. 6.1 ff.; KENNET (1993) 656.

³²³ WADDAMS (1999) 476-477 (emphasis added).

³²⁴ The Québec Court of Appeal rejected the argument of unjust enrichment in the context of invalid municipal contracts: *Corporation of St-Romuald v. S.A.F. Construction*, [1974] CA 411 (CAQ) severely criticised by GARANT (1996) 544-546. As for the equivalent in common law restitution: GRANTHAM, R.B., RICKETT, C.E.F., “Disgorgement for Unjust Enrichment”, (2003) 62:1 *Cam LJ* 159-180, 159.

³²⁵ Its application against public authorities is not entirely resolved in Canada: *Mount Sinai v. Québec*, [2001] 2 SCR 281; GARANT (1996) 84. ARROWSMITH (1988) 257 ff., writing about government

on international texts having legal “reach” or “import” and those which do not,³²⁶ VIRALLY used the term in a relatively non-technical manner to argue that parties may be precluded from acting in a way which is contrary to an undertaking, despite the fact that the latter lacks legally binding character.³²⁷

The doctrine of legitimate expectations, and its corresponding principle of “bonne administration” could also be invoked as a means of stopping a government from going back on its word. It basically provides some legal protection in cases where a promise or a representation had created a legitimate (generally understood as “reasonable”) expectation in some other party, even if those are not embodied in formally binding texts (contracts, or regulations, for instance).³²⁸ The expectation (or reliance, or “*confiance*”) can arise from an express promise or from the conduct of a decision-maker. What is “legitimate” or reasonable is of course subject to substantial debate. While it may not be reasonable to expect a vaguely termed “memorandum of understanding” never to be unilaterally depart from, the same may not be true of a detailed arrangement, on the basis on which specific action is taken, and that is applied for a number of years.

In the *CAP Reference*,³²⁹ the Supreme Court of Canada denied that the doctrine of legitimate expectations could prevent an executive party to an IGA from filing into Parliament a legislative bill that had the effect of derogating from the IGA.³³⁰ As we shall see, the Court ruled that the doctrine of legitimate expectations could never be used to curb Parliamentary sovereignty, and that precluding the executive from introducing legislation amounted to “paralysing” Parliament.³³¹ The Court did not, however, entirely reject the potential application of the doctrine when governments do not act as a conduit in the legislative process but in their purely executive or administrative function. Interpreted *a contrario*, the *CAP Reference* actually suggests that in the absence of legislative intervention, which the principle of parliamentary sovereignty cannot restrict, the agreement could have given rise to arguments in legitimate expectations.

contracts in general, argues that estoppel should particularly be considered when a public authority has not followed appropriate procedures

³²⁶ The translation of the more elegant French title obviously proved difficult, both “reach” and “import” being used, neither being common English expressions. The French original was “*portée juridique*”: Compare original Resolution and final one (T.II, pp. 139 and 285).

³²⁷ See also: MÜNCH (1983) 326; SCHACTER 299-301; EISEMANN (1979) 346-347; DAILLET and PELLET (2002) 391.

³²⁸ The potential application of these doctrines to protect third party interests is explored *infra*, 5.4.

³²⁹ *Supra*, 4.1.3.

³³⁰ In fact, the *CAP Reference* does not even go that far, since the bill was meant to amend federal legislation, not the IGA itself. But it is obvious that the bill had the effect of altering a cooperative scheme in which IGAs played a central part.

³³¹ This is particularly true since pursuant to s.54, *Constitution Act*, 1867, bills relating to public spending may only be introduced by the executive: *CAP Reference*, 559.

In the common law, the doctrine of legitimate expectations has given rise to substantial judicial and doctrinal analysis, which cannot be detailed here.³³² Of significance, is the question whether a government which legitimately relied on a non-binding IGA would be entitled to the actual content (“substance”) of the IGA, or whether, it should be entitled to some form of explanation, justification, even perhaps negotiations, before the other one can depart from it.³³³ Taken to its logical conclusions, the first solution arguably amounts to a round-about-way of enforcing a non-legally binding IGA. In fact, in the *CAP Reference*, and in subsequent cases, the Supreme Court of Canada has rejected the substantive branch of the doctrine.³³⁴

Interestingly, architects of the devolution process in the United Kingdom explicitly envisaged that the doctrine of legitimate expectations could apply to curb the freedom of executives party to what are undeniably non-legally binding “concordats”.³³⁵ Canadian courts have been more reluctant to provide an extensive reading of the doctrine of legitimate expectations, than their British counterparts.³³⁶ It is nevertheless worth considering whether the potential influence of that doctrine in the UK in the context of intergovernmental agreements could eventually lead to a reconsideration of the issue in Canada.

In Belgium, these doctrines have apparently not been invoked in the context of disputes between federal partners.³³⁷ There is certainly no application to cooperation agreements. Analogies, however, are worth considering. Hence, the administrative section of the Council of State has ruled that although internal directives are not formally binding, public authorities wishing to derogate from them must provide some reasonable explanation. This rests of requirements of “coherent management, equality of treatment and legal

³³² CRAIG, Paul, “Substantive Legitimate Expectation in Domestic and Community Law”, [1996] 55 *Cam LJ* 289-312; FORSYTH, Christopher, “The Provenance and Protection of Legitimate Expectations”, (1988) *CLJ* 238; CLAYTON (2003). See dissenting judgement in *Mount Sinai v. Québec*, [2001] 2 SCR 281.

³³³ These are respectively known as the substantive and procedural branches of the doctrine.

³³⁴ In the *CAP Reference*, the Supreme Court rejected substantive legitimate expectations. It has reiterated that position since: *Baker v. Canada (Min. of Citizenship and Immigration)*, [1990] 2 SCR 817, par. 26-29. Some members of the Court seem to be edging towards some form of substantive remedies, but this apparently remains a minority position: *Mount Sinai v. Québec*, [2001] 2 SCR 281. British Courts, by contrast, are more open to the argument, with a number of nuances: *Coughlan*; CRAIG (1996) 290; Le SUEUR (1999) 287 ff.; CLAYTON (2003).

³³⁵ POIRIER, *Concordats*.

³³⁶ MULLAN, David, “CAP -Denying Legitimate Expectation a Fair Start ?” (1993) 7 *Adm LR* 2d, 269-292.

³³⁷ It is risky to be affirmative on this, since these doctrines go under different names, and the reasoning in some case law is often extremely laconic. The literature does not invoke any such doctrines in the context of cooperation agreements, except for UYTENDAELE who uses it to buttress his argument that agreements are located above unilateral norms in the hierarchy of norms: *infra*, 6.3.1.1.

security” which all partake of the general principle of “good administration”.³³⁸ This apparently corresponds to the procedural branch of the doctrine of legitimate expectations.

There may be a “communicating vessels” phenomenon between the test for determining the legally binding character of an agreement on the one hand, and resort to other doctrines which give non binding agreements some legal effect, on the other. Put another way, it is arguable that when it is harder to cross the threshold of juridicity (notably because of the presumption against legal status), courts may be more inclined to resort to alternative solutions to avoid results that strike as unfair. Conversely, the presumption of legal character in Belgium may facilitate the legal characterisation of an instrument which, in Canada, would not cross the legal threshold of juridicity. In this context, there may be a lesser need to resort to alternative solutions.

Regardless of their technical differences, all these doctrines are grounded on similar considerations of fairness and good faith, taken in their non-technical, ordinary sense. In some cases, it simply seems unfair to allow a party to renege on its word, on the basis that an agreement is invalid, that formalities have not been properly complied with, or even that there has been a change in policy. They are means of softening the potential impact of a finding that an agreement falls, for a number of reasons, on the non-legal side of the threshold of juridicity.

The foregoing does not imply that any one of these doctrines is necessarily available whenever an IGA remains on the “non-legal” side of the threshold. *A priori*, they cannot serve to circumvent public law restrictions to the binding character of IGAs.³³⁹ Hence, if an IGA is held to contain undertakings of such a “governmental” nature that it violates the rule against fettering of discretion in the Canadian context, resorting to the doctrine of legitimate expectations to preclude one party from departing from these undertaking may have exactly the same effect.³⁴⁰

Similarly, obtaining redress for non-compliance with a Belgian cooperation agreement that violates the distribution of competences, or fails to receive legislative assent when this is required may be problematic. The entire context would have to be considered. It may be that a party’s good faith could be called into question if it failed to submit the IGA to its

³³⁸ CSAC 24.467 (20.06.1984) (*Beheyte*); CSAS 63.063 (14.11.1996) (*Tasse*); CSAS 83.144 (26.20.1999) (*Clareboets no.1*).

³³⁹ It is unclear, for instance, that the doctrine should be available in case of lack of budgetary appropriation. Note that in *Communauté française v. Trine*, the Court of Cass. denied any value to a ministerial circular applied for years, but that contradicted formal regulations. The argument of “*bonne administration*” was not argued: ERGEC (1998).

³⁴⁰ Recently, an Ontario Court held that a decision of “high policy” excluded any claim in legitimate expectations: *Black v. Chrétien*, (2001-05-10) ONCA c33387 (canlii).

assembly. In such a case, the IGA could not be legally binding, but a court may very well seek to provide some remedy to the other party, and to send a message to the defaulting executive. Again, this would amount to a judicial call for the executive to explain or justify its actions.

Finally, it must be emphasised that in neither in Canada nor in Belgium can these various doctrines counteract the effect of legislative provisions.³⁴¹ Whether other legal doctrines can have the effect of curbing the freedom of the legislative branch to adopt norms contradicting IGAs is explored in Chapter 6, as these would have the effect of tempering with the hierarchy of norms.³⁴²

Detrimental reliance, estoppel or legitimate expectations are unlikely to be used indiscriminately to render irrelevant the setting of thresholds between regulatory and administrative IGAs on the one hand, or between political and legally-binding contractual instruments, on the other. Reasons why an IGA is held not to cross that threshold would have to be examined before an alternative legal remedy is granted.³⁴³ These various doctrines nevertheless represent judicial means of bringing parties to keep to their words, or at least not to cause damages to other governments (or third parties, who relied on those words). They are invoked here to dispel the conclusion that the failure to characterise an IGA as a binding instrument implies the ousting of law altogether.

Conclusions

Intergovernmental agreements have the potential of binding federal partners at law in both Belgium and in Canada. This capacity flows from the inherent power of the executive to contract in Canada. While in Belgium, it is unclear whether federal partners could have bound themselves through IGAs prior to the insertion of s.92*bis* in the 1980 DMA in 1988-89, this capacity is now undeniable. The characterisation of IGAs as binding contractual instruments faces a number of hurdles, however. Assuming those who conclude the agreement are duly authorised, certain “public law impediments” could nevertheless interfere with any intention to create legal relations. Some of these impediments are common to both federations, others are specific to each.

³⁴¹ *Wells v. Newfoundland*, [1999] 3 SCR 199, 263; TOWNSEND (1991) 293-324; *Hogan*; MAST (1989) 43.

³⁴² Those include federal loyalty, constitutional conventions and principles of federalism. Those principles are invoked to curb the power of the legislative branch to legislate in contradiction to IGAs, as opposed to providing remedies for a dispute between executives. The connection between the doctrines explored in the present section and those is undeniable, however.

³⁴³ While it is not possible to examine the issue of remedies here, there would likely be differences in what a party can obtain through an action for breach of an IGA, and what it could obtain through an application in detrimental reliance, estoppel or legitimate expectations.

Hence, neither in Belgium nor in Canada can executives contract to exchange or cede constitutional competences, or to legislate in a particular manner.³⁴⁴ In both federations, agreements that closely resemble private contracts will likely pass muster as legal instruments.³⁴⁵ It is fair to say that Canadian courts have not been too concerned with the way in which governments fetter their discretion through IGAs, when the question does not arise directly. But it appears that the “rule against fettering of discretion” could still find judicial resonance should a government itself raise it to challenge the characterisation of an IGA as a binding contract. In Belgium, the adoption of s.92*bis* in 1988-89 has apparently removed any potential application of the corresponding legal impediment, so that federal partners can bind themselves with regards to “government” functions, in a way that would be invalid were a similar agreement entered into with a private party.

This greater facility to conclude binding agreements is, however, largely limited by the explicit requirement that Belgian cooperation agreements involving public funds, binding third parties, or trespassing on the domain reserved to the legislative branch, require legislative assent. These conditions, found in a quasi-constitutional Act preclude the legal characterisation – even *inter partes* – of agreements of this nature which do not obtain this assent. There is no equivalent rule in Canada, apart from the general requirement that public spending receive parliamentary approval, which is normally granted for wide ranges of programmes and not with regards to specific IGAs. Hence, while in theory Belgian executives can tie themselves with regards to government functions, a large chunk of governing, notably the commitment of funds, requires the explicit case-by-case concurrence of the legislative branch.³⁴⁶

In the end, the legal status of IGAs *inter partes* does not differ as radically between the two federal regimes as I had originally surmised. The difference is more a matter of presumptions concerning legal character than of widely divergent status. I have argued that in both federal regimes, the determination that an IGA constitutes as a binding instrument *inter partes* requires an assessment *in concreto*, taking into consideration relevant rules of public law which preclude the conclusion of binding agreements, as well as a number of other indicia of legal character, outlined in the third section of this Chapter. These indicia may serve to confirm the presumption that IGAs constitute legally-binding instruments (in Belgium) or to overturn what appears to be the opposite presumption (in Canada). Only this

³⁴⁴ As we shall see in Chapter 5, however, IGAs constitute a recognised form of bi- or multilateral law making. The action must be taken together, however, and not result from a contractual undertaking to alter one’s own legal order.

³⁴⁵ This could, however, lead to their recharacterisation as civil contracts in Belgium, over which ordinary courts, rather than cooperation tribunals, would have jurisdiction.

³⁴⁶ The other two conditions are more relevant to the characterisation of IGAs as instruments *erga omnes*: *infra* Chapter 5.

characterisation exercise can justify the conclusion that a particular agreement, which necessarily has political foundations, crosses the threshold of juridicity. These indicia include elements of content, form and of the parties' behaviour.

This being said, when executives submit the resolution of a dispute concerning an IGA to a proper court or arbitration tribunal, the latter is likely to get on with the job of resolving the dispute, rather than seeking to (re)characterise the instrument it is asked to interpret and apply.³⁴⁷

Finally, even agreements that remain on the "purely political" side of the threshold may have legal effect. A number of interrelated doctrines could potentially be invoked to afford some legal protection to a government party that reasonably relied upon the word of another one, even if this word is embodied in a text which, for whatever reason, cannot be characterised as a contractual instrument. These include unjust enrichment, detrimental reliance, the principle of good administration and legitimate expectations. Hence even when the legal system cannot directly embrace a political instrument, it may still extend its reach to offer it some protection.

³⁴⁷ The situation may admittedly be different were a Belgian agreement to include civil law clauses or clearly be unconstitutional. A cooperation tribunal could potentially decline to exercise its jurisdiction.

CHAPTER 5: IGAs AS NORMATIVE INSTRUMENTS

Introduction

The purpose of the present chapter is to examine IGAs as devices for introducing legal norms of general application, by contrast to mere government-to-governmental undertakings. The focus is on whether and how instruments that have contractual foundations can be a source of law *erga omnes*. It must be recalled that the “*erga omnes*” qualifier refers to the persons subject to the legal order of each signatory to an IGA (“*les administrés*”), and not to every third party, such as orders of government that are not party to a particular agreement.

As we saw, in Canada, IGAs are essentially examined through the prism of government contracts.¹ Despite this dominant contractual conception, it is admitted that IGAs can obtain additional normative force if they are somehow incorporated into a traditional – unilateral – norm. In this case, the agreement may – or may not – bind the parties as a contract. This would depend on the indicia of contractual legal character examined in Chapter 4. But the *imprimatur* of external unilateral norms, superimposed on IGAs, can transform them into normative instruments *erga omnes*. This is consistent with the classic dual conception of the Canadian federation in which each federal partner is endowed with independent legislative and executive powers. Apart from constitutional rules that apply to every component of the federation, there is no sense that law-making could be a joint enterprise. There may be schemes pursuant to which unilateral norms are coordinated, but, in law, these norms remain unilateral. This, at least, is the orthodoxy. We shall see that the delegation of regulatory power to joint organs somewhat defies this conventional conception of parallel sources of unilateral legal rules.

By contrast, we saw that from the start, the main interest of inserting a specific provision regarding Belgian cooperation agreements in the 1980 DMA was not *per se* to secure their contractual character (although this was a partial by-product of this insertion). The objective was to facilitate and simplify concerted action or the creation of joint bodies.² Before the adoption of s.92*bis*, executives adopted a number of complex schemes with

¹ Analogies between contractual and more traditional legal norms is not frequent in Anglo-saxon legal literature: WHITTAKER, Simon, “Public and Private Law-Making: Subordinate Legislation, Contracts and the Status of “Student Rules”, (2001) 21: 1 *Oxford JLS* 103-128, 106 (talking of English lawyers, but the statement has wider application).

² *Supra*, Chapter 4, section on pre-1988 case law

parallel legislation, much as Canadian authorities do today.³ This was deemed neither effective, nor conducive to cooperation.⁴ Moreover, by contrast to the benevolence of Canadian courts to intertwined cooperative arrangements that often blur the borders of constitutional competences,⁵ the legislative section of the Council of State's staunch protection of the principle of autonomy, embodied in the exclusivity of competences, led it to reject as unconstitutional some of these pre-1988 cooperative schemes.⁶ Alternatives were therefore sought, to allow for concerted action.

Wilfrid MARTENS, who was federal Prime Minister of Belgium when s.92*bis* was adopted in 1988-89, distinguished agreements concluded between executives prior to that institutional innovation:

“These protocols only had political value and in this resides the major difference with cooperation agreements introduced by the 1988 reform. While previously, the result of protocols had to be transposed in normative provisions applicable within each legal order, it is now possible to conclude *cooperation agreements that are directly applicable*.”⁷

Hence, if the foundations of cooperation agreements adopted under the umbrella of s.92*bis* are undeniably consensual, they have a normative value *erga omnes* that contracts cannot have. In other words, while in Canada normative instruments *erga omnes* (legislation or regulation) are always considered unilateral, even when intertwined in a web of some intergovernmental construction, in Belgium, s.92*bis* has apparently introduced a new bi- or multi-lateral norm *erga omnes*, alongside the traditional unilateral ones.

The remainder of this chapter analyses whether and how IGAs can be characterised as having a normative force *erga omnes* that is comparable to more traditional norms of public law, such as the Constitution (5.1), legislation (5.2) and regulatory instruments (5.3).

First, however, further precisions on the terminology used throughout this chapter are in order. Hence, as has been the case so far, the expressions “legislative instrument”, “legislation” “Act” and “statute” are used interchangeably.⁸ They refer to formal norms adopted by legislative assemblies.

³ *Infra*, 5.3.2.

⁴ ALEN and PEETERS (1989) 351; de WILDE (1990) 92 ff.

⁵ For instance: *Milk Board v. Grisnich*, [1995] 2 SCR 895.

⁶ CSLS 23.02.1987 (MB 16.04.1987); CSLS 16.444/9 02.12.85, unpublished, on file with author.

⁷ MARTENS, Wilfrid, “Discours inaugural”, in ALEN, André and al (eds.), *Les conflits d'intérêts; quelle solution pour la Belgique de demain?* (Namur: La Charte, 1990) 5-12, 10 (my translation, emphasis added).

⁸ This circumvents the complex terminology in Belgium, where the legislative instruments adopted by federal and federated authorities do not bear the same name, although they are of equivalent normative force. *Supra*, “Preliminary remarks on terminology” in General Introduction.

The expression “regulatory instrument” is a compromise, which requires some explanation. In both Canada and Belgium, there is a wide category of instruments taken by the executive, or administrative bodies, pursuant to specific legislative authorisation. In Canada these are called “statutory instruments” or “*textes réglementaires*”.⁹ In Belgium, those are described as “*règlements*”.¹⁰ A particular class of such instruments corresponds to delegated or subsidiary legislation. These are not solely acts taken in execution of a statute, but are truly legislative texts taken by the executive, under the explicit authorisation of the legislative assembly. Once adopted following a specific procedure (normally formal governmental approval, publication and so on), these have the same legal force as legislation. In Canada, those are described as “regulations” or “*règlements*”, while the Belgian term is “*arrêté*” “*arrêté royal*” or “*arrêté réglementaire*”.¹¹

An additional source of confusion lies in the fact that in French, the term “*régulation*” has been coined to convey the wide array of regulating techniques used (including “*règlement*”). “*Régulation*” is thus wider than “*réglementation*”. In North American literature, the word “regulation” is sometimes used in the same way,¹² while in England, “regulation” is still used in its narrow sense to describe delegated legislation.¹³

This field is thus filled with “*faux amis*”. In an attempt to navigate through this lexical labyrinth, I will use the term “regulation” to mean subsidiary legislation (that is “*arrêté*” in the Belgian or “*règlement*” in the Canadian sense). “Regulatory instrument” will be used to refer to the wider category of devices used by the executive to introduce legal rules (that is, the equivalent to the particularly confusing “statutory instruments” in English Canada, and “*textes réglementaires*” in Belgium and Québec).

5.1 “Constitutionalised agreements”

5.1.1 “Constitutionalised agreements” in Canada

As we saw in Chapter 4, “constitutionalised” agreements refer to historical agreements which have been entrenched and can therefore only be modified through formal constitutional amendment. As constitutional norms, they are undeniably binding on third parties. In this sense, their legal character *erga omnes* is easily established. These agreements pose a particular challenge, however, when rights which third parties may derive from them, are considered (as opposed to obligations).

⁹ *Statutory Instruments Act*, RSC (1985) ch. S-22, s.2.

¹⁰ LEROY (2000) 172-173; UYTENDAELE (2001) 425.

¹¹ “*Arrêté royal*” is used to qualify those taken by federal authorities. The expression “*acte réglementaire*” is a synonym: MAST (1989) 25.

¹² Although not, as we saw, in legislation, which sticks to the formal and strict meaning of “regulation”.

¹³ MOCKLE (2002) 152-154.

The difficulty originates from the context in which these agreements were concluded and the mixed nature of their content. On the one hand, Terms of Entry profoundly altered the status of joining provinces: they lost their colonial status, and became federated entities. In this sense, the instruments are thus plainly “constitutional”. On the other hand, the bargaining that led to their adoption explains a number of prosaic and eccentric clauses. For instance, the 1949 Newfoundland Terms of Entry contain (what was then) an exceptional authorisation to produce margarine!¹⁴ We have seen that the PEI and BC Terms of Entry contained specific undertakings concerning transport infrastructure. Such clauses can pose particular difficulties decades later, in the face of vastly different economic and mostly technological conditions. As we saw, the interpretation of the scope of the governments’ respective responsibilities pursuant to these clauses has given rise to a number of disputes (can a 19th century promise to maintain ferry service be interpreted as allowing its replacement by a bridge, a hundred years later?).¹⁵

With regards to the *erga omnes* impact of constitutionalised agreements, these difficulties are compounded not only by the passage of time, but also because the normative force of these odd instruments with regards to non-government parties was unclear from the start. They were not negotiated as constitutions (although they partially play that function), but as contractual instruments. They were then enshrined in statutes (even though Westminster statutes had constitutional value). As we saw in the previous chapter, this led to a range of characterisation of the same instrument: from a political deal to a treaty. A complete exploration of what this meant for non-government parties is beyond the scope of this thesis.¹⁶ At this stage, I will limit myself to identifying a few established base rules and remaining zones of doubt.

First, citizens can certainly challenge the constitutionality of legislative or regulatory measures that contradict a constitutionalised agreement.¹⁷ Similarly, when constitutionalised agreements restrict the powers of a particular government, third parties sued pursuant to an Act taken in contradiction of these agreements can always raise them in defence.¹⁸ For instance, one of the main purposes of the 1930 *Natural Resource Transfer* Agreements (NRTAs) was to ensure that provinces respect arrangements previously made by the federal government, notably with oil and gas companies, and with First Nations.¹⁹ Hence, Prairie Provinces undertook to respect certain aboriginal hunting rights. This implies that certain

¹⁴ *Newfoundland Act, 1949*, Scheduled to *Constitution Act, 1982*; reproduced in TREMBLAY (1999) 377-398.

¹⁵ *Supra*, Chapter 4.

¹⁶ On this: BANKES (1992).

¹⁷ *Hogan v. A.G. Newfoundland*, (2000) 183 DLR 4th 225 (NFCA), 255 [*Hogan*].

¹⁸ *Jack v. R.*, [1980] 1 SCR 294; BANKES (1992) 537- 545.

¹⁹ BANKES (1992) 542 and cases cited.

provincial statutes which curb this practice are unconstitutional.²⁰ Oddly, the NRTAs which transferred natural resources to provinces imposed conditions on them. They did not impose conditions on federal authorities. Hence, a severely divided Supreme Court held that the NRTAs are protected against contrary provincial²¹ but not against... federal legislation.²² How this is supposed to protect acquired rights is a puzzle.²³

Constitutionalised agreements not only curb government powers. As we saw, they also impose specific obligations on them: that of building a railroad, for instance. The characterisation of such undertakings with regards to third parties is particularly muddled.

For instance, it will be recalled that in the *PEI Ferry* case, the Federal Court ruled that the federal government had an obligation to provide continuous ferry service between the Island and the mainland. The Court found a statutory breach on the part of Ottawa when the service was interrupted, due to a national strike, and ordered the payment of damages.²⁴ The Court opined, *obiter*, that citizens could not have claimed damages for the violation of the Terms of Entry by Ottawa.²⁵ For Le Dain J., the undertaking was only made in favour of the province, not of its population. The underlying contractual conception is obvious. In partial dissent, Pratte J. admitted that it was the population, rather than the government that actually suffered from the strike. Logically, it should be entitled to reparation. Fearing the consequences of his own conclusion, however, he quickly added “[b]ut this, I would find unacceptable”.²⁶ As BANKES reflects: “[h]aving peered around the floodgate doors, he quickly slammed them shut”.²⁷ In other words, these constitutionalised agreements could not generate rights *erga omnes*.²⁸

Since 1982, these duties have acquired a clear “constitutional” label. It is certainly arguable that the full-fledged constitutionalisation of those agreements has lessened their contractual or statutory character and that they must henceforth be interpreted as constitutional norms. The impact on obligations between governments is probably not

²⁰ *Jack v. R.*, [1980] 1 SCR 294.

²¹ *R. v. Sutherland*, [1980] 2 SCR 451.

²² *Daniels v. White and the Queen*, [1968] SCR 517.

²³ The scheduling of these instruments to the *Constitution Act, 1982*, confirms the constitutional character of these instruments. Modification to their terms implies a formal amendment process. However, this scheduling has not had the effect of imposing new obligations on federal authorities. The discrepancy apparently subsists.

²⁴ Until 1982, the Terms of Entry could not be modified unilaterally, but were still only incorporated in parallel federal, provincial and Westminster statutes. Hence, the characterisation of a violation as “statutory”.

²⁵ *PEI v. Canada*, [1978] 1 FC 533 (FCA) [the *PEI Ferry* case].

It is peculiar that breach of statutory duties gave rise to damages.

²⁶ The *PEI Ferry* case, 576 *per* Pratte J.A., diss. in part.

²⁷ BANKES (1992) 539.

²⁸ See also *Samson v. R.*, [1957] SCR 832 in which the Court denied a Newfoundland employee the benefits of a particular clause of the province’s Terms of Entry.

significant. However, one would expect a “constitutional duty” to be owed to all. Admittedly, the consequences of finding a truly *erga omnes* constitutional right to a ferry service in PEI, a particular railway line on Vancouver Island, or to produce margarine in Newfoundland could be problematic. The solution is to secure constitutional amendments. In the meantime, however, it is unclear whether faced with a third party action to enforce the content of a constitutionalised undertaking, courts would interpret them in a generous and teleological manner, as a constitution, or would still attempt to impose limits on the scope of rights *erga omnes*, because of the particular origins of the instruments.²⁹

5.1.2 Agreements of a constitutional force in Belgium

As we saw in Chapter 2, there are no equivalent to “constitutionalised” agreements in Belgium, although certain transfers of competences between federated entities could be analysed through this prism.³⁰ Once this is accomplished following the proper procedure, the arrangement has the same effect as a constitutional amendment: it amounts to the transfer of legislative authority, opposable to all. The Canadian peculiarity in which third parties may be bound, but have somewhat curtailed rights, simply would not arise.

5.2 IGAs having legislative (or supra-legislative) status

In both federations, legislative assemblies can intervene to confer legal force *erga omnes* to IGAs. The impact of that intervention is not identical in the two federations, however.

5.2.1 Parliamentary involvement and the status of IGAs in Belgium

Since 1993, s.92*bis* explicitly provides that legislative assemblies must give their assent to all cooperation agreements which:³¹

- 1) have financial implications for the public authorities;
- 2) create obligations for individuals; or
- 3) deal with matters reserved to the legislative branch.

²⁹ In *Hogan*, the NFCA denied particular protection to third parties who lost privileges following a constitutional amendment to the Terms of Entry (in this case, Catholics challenged the abolition of the publicly funded confessional school system that had grounding in the Terms of Entry).

³⁰ *Supra*, Chapters 3 and 4.

³¹ In fact, the 1993 amendment made more explicit the 1988-89 text of s.92*bis*, which more cryptically stated that legislative assent should be obtained “when required” (“*le cas échéant*”): le HARDY (1990) 124.

It will be recalled that the adoption of s.92*bis* was meant to address three sets of problems. One was the hurdle to joint action generated by the strict interpretation of the exclusivity of constitutional competences by the legislative section of the Council of State in the context of pre-1988 protocols.³² This obstacle has only been partially removed. Indeed, both the CSLS and the Court of Arbitration maintain that cooperation agreements may only be constitutionally concluded if every party is thereby exercising one of its own competences. This is so even if legislative assent is secured.³³ In other words, an agreement cannot be used to allow some interference by an order of government into a matter which falls within the competences of another, even it is to finance a particular project.³⁴ In brief, s.92*bis* has removed a bar on joint action, but this joint action must rest on some form of constitutional competence on the part of each signatory.

Secondly, s.92*bis* was meant to obviate the complexity of cooperative schemes that again flowed from a very restrictive interpretation of the principle of autonomy by the Council of State prior to 1988. To create a joint programme, provide services to another order of government or set up an intergovernmental body, parties had to conclude some sort of political agreement, and then adopt separate legislative and interlocking instruments to give it effect, hoping assemblies would not actually alter the content of the agreement.³⁵ As we shall see, this is still essentially the way in which cooperative schemes are still set up in Canada today. Belgian authorities sought means of simplifying the process.³⁶

Thirdly, s.92*bis* was seen as means of enabling executives to jointly draft a text which, within their respective legal order, could only be adopted through a statute.³⁷ They can then submit it their respective legislative assemblies for wholesale approval or rejection. While prior to s.92*bis*, it was understood that assemblies should be allowed to consider the "transformation" legislation article by article, with the new procedure, the only clause on which parliamentarians are formally asked to pronounce simply gives assent to the IGA. While there is no text to this effect, it has been understood that the adoption of s.92*bis* has radically altered the role of the legislative branch with regards to executive assemblies. Legal rules with impact *erga omnes* may not be introduced without assent, but this seems to amount to an *a posteriori* authorisation given to the respective executives to adopt rules, which, were they acting alone, would require formal legislative instruments.

³² *Supra*, Chapter 4.

³³ CA17/94.

³⁴ *Supra*, 4.2.3.2.

³⁵ De WILDE (1990) 91.

³⁶ A third difficulty which *may* have been resolved by the adoption of s.92*bis* was the risk that having to proceed through interlocking legislation, a party unilaterally pulled out through a contrary act. Whether such an eventuality has actually been set aside is addressed in Chapter 6.

³⁷ VELAERS (1999) 877.

A typical example is the conclusion of agreements meant to harmonise the transposition of European Union directives into the Belgian legal order, when their subject matter falls within the sphere of competence of federated entities (or both federal and federated orders). In the absence of s.92*bis*, each federal partner would have to adapt its own legislation to ensure consistency with EU norms.³⁸ To avoid discrepancies, executives can elaborate a common text transposing the directive, eventually even creating joint organs in charge of implementation, and then submit it to their respective legislative assemblies. The legislative acts merely provide that the agreement is to “be given effect”, “is assented to”, or “approved”.³⁹ Parliamentarians are not asked to vote on specific provisions, nor can they propose amendments.⁴⁰

Similarly, the joint creation of an organ with legal personality requires legislative assent.⁴¹ To give an example, an inter-regional agreement was concluded to harmonise the introduction in the domestic legal order of a European directive on waste management. This agreement creates a Commission that can notably impose fines on retailers and industries for violating certain norms contained in an IGA, or even penal sanctions for those who refuse access to investigators.⁴² The imposition of such sanctions requires legislative action. Here, the legislative action is limited to approving a joint text.

This quasi-constitutional requirement of parliamentary approval gives rise to three different scenarios. Hence, the legal status of agreements which obtain proper assent, as well as the status of those which require it, but fail to obtain it, are examined in the rest of this sub-section. The status of those which apparently do not require such approval is explored in section 5.3.1, under the heading “IGAs having regulatory status”.

5.2.1.1 The status of agreements which have received parliamentary assent

Pursuant to s.92*bis*, agreements of a legislative nature only produce their “legal effect” after they have received what is officially described as “legislative assent”. Assent may not be given “by anticipation”, that is, parliamentarians must vote on the final text,⁴³

³⁸ MOERENHOUT (2001, 617) estimates that the majority of agreements published in the MB between 1996 and 2000 were adopted in order to implement European law in matters of transportation, environment and agriculture.

³⁹ The term used in s.92*bis* is “assent”, and this is the term the Council of State generally insists on. There are derogations, however, and the terms used do not have any bearing on the status of the agreement (by contrast to the Canadian situation: *infra*, 5.2.2).

⁴⁰ *Supra*, 2.2.1.4.

⁴¹ COENRAETS (1998) 96.

⁴² AC sur la prévention et la gestion des déchets d’emballages (3R), 30.05.96 (05.03.97).

⁴³ CSLS 24.479, Doc CRW, 1995/96, 162. By contrast, international treaties may receive “anticipatory” legislative approval: CONSEIL D’ÉTAT, *Rapport public pour l’année judiciaire 1995-1996* (1999) 12 *Chron. Droit public* 1-2.

which cannot have retroactive effect.⁴⁴ If implementing agreements are anticipated, they must also be submitted to legislatures.⁴⁵ Once it has been assented to, a cooperation agreement has, at a minimum, the same normative force as a statute within the legal order of the approving legislature.⁴⁶ Through this assent, rights and obligations contained in the agreement become “directly applicable”, in the sense that if framed with sufficient specificity, they do not require further action by the orders of government party to the agreement.⁴⁷ They are thus binding on third parties, who may rely on them in a court of law, as if they were a statute.

For example, the inter-regional agreement on waste management mentioned above contains obligations concerning the disposal of waste that apply equally to industries and retailers located in every Region.⁴⁸ Once legislative assent was given to the agreement, these obligations became directly applicable in all three federated entities, without further legislative or regulatory action.⁴⁹ Having received this assent, the IGAs in question are truly normative instruments *erga omnes*.

Legislative assent is rarely obtained simultaneously in the various orders party to an agreement.⁵⁰ Presumably, once the legislative assemblies of two parties to a multilateral agreement have given assent to it, it becomes binding. The lack of coordination is particularly problematic in the case of “compulsory” agreements, since, as we saw, the constitutional *status quo ante* is maintained until their formal coming into force. What is the actual distribution of powers, when the agreement is in force in the legal order of one or several components of a federation, and not in others? While this lack of coordination has occurred in the past,⁵¹ the anomalous legal situation has not given rise to any litigation and has not been discussed in the literature.

⁴⁴ CSLS 22.794/8, Doc VI R, 1993-1994, 485/1, 131 and 23.822/8, Doc VI R, 1994-1995, 719/1, both discussed in *ibid*, 2.

⁴⁵ CSLS 30.037-2, Doc Parl, 95 CCF, 1999/2000.

⁴⁶ There is a certain controversy concerning the characterisation of the norm of assent. For some, it is a purely formal act of control by the legislative branch over the executive, as are Acts giving assent to international treaties. They would not have normative force as such (de WILDE (1989) 437): *infra*, Chapter 6.

⁴⁷ This direct applicability depends, of course, on the tenor of the agreement itself.

⁴⁸ AC sur la prévention et la gestion des déchets d’emballages (3R), 30.05.96 (05.03.97).

⁴⁹ COENRAETS (1998).

⁵⁰ When this occurs, the Secretariat to the Concertation Committee is of the opinion that “the cooperation agreement does not enter into force on the same day in the different legal orders”: *Circulaire relative à l’entrée en vigueur et au suivi des accords de coopération* (05.11.2003) II(2)(b)(2).

⁵¹ For instance, a 2002 agreement relative to the creation of the External Trade Agency was submitted by the Walloon government to the Walloon assembly after it had been published in the MB, while the BCR proceeded to give assent and publish before the other two Regions. In the meantime, the status of the staff which was to be transferred to the Agency was shrouded in uncertainty.

5.2.1.2 The status of agreements requiring parliamentary assent, which fail to receive it

Acting jointly through cooperation agreements, executives can in effect enter the domain of the legislative assemblies. S.92 *bis* provides that this should not be done without the latter's concurrence. In Switzerland and in Spain, where a similar distinction between agreements of a legislative and of an administrative character also exists, a trend towards a characterisation *de minimis*, has developed. That is, whenever possible, executives will attempt to demonstrate that the agreement does not tread on legislative ground. This has the advantage - from the executives' perspective - of restricting parliamentary control, public scrutiny, and in the case of Switzerland, of seeing an agreement rejected by referendum.⁵²

Whether such a trend is also developing in Belgium is uncertain. What is obvious, however, is that a number of IGAs which should be submitted to legislative assemblies are not. This is the case, for instance, of a number of federal-regional agreements on employment policy, in which the former makes specific financial undertakings.⁵³ The agreements were published, but never submitted to assemblies. Surprisingly, the Cour des comptes, which oversees the validity of public spending, does not seem to have questioned the practice.⁵⁴ Some maintain that it is difficult to conceive of any IGA which does not have at least an indirect impact on public finances or third parties, so that they should all be submitted to legislators.⁵⁵ This position may be somewhat exaggerated and it is arguable that certain procedural agreements (setting up information sharing processes, for instance), probably do not meet the criteria for legislative assent.⁵⁶

Means of ensuring respect for this parliamentary approval are limited. For one thing, the determination that a particular agreement requires legislative assent lies with the executives. Parliamentarians can ask parliamentary questions, but do not have any power to force the executive to submit an agreement to a vote.⁵⁷

The Legislative section of the Council of State (CSLS) has held that until this assent is given, an agreement does not have legal effect with regards to third parties, and between

⁵² On this: POIRIER, *Report*, 2001.

⁵³ AC concernant la convention de premier emploi (FED + RBC), 25.10.00 (18.12.01, 2^e ed.) ; 2nd IGA, 01.08.02 (19.11.02). See also the 1993 Agreement on the promotion of Brussels and its 8 codicils, which are a major source of financing for Brussels, but were never submitted to assemblies: POIRIER, *Solidarité*; MOERENHOUT (2001) 618.

⁵⁴ See also AC pour le transfert [...] du personnel et des biens [...] de la province de Brabant (FED + 3R + FL C + Fr C), 30.05.94 (17.06.94), which clearly affected employees who were transferred. The agreement was never approved by legislatures.

⁵⁵ Interviews conducted.

⁵⁶ For ex: AC pour une politique de drogues globale et intégrée (FED + 3C + COCOF + COCON + COCOM + 3R), 11.05.2003 (02.06.2003).

⁵⁷ *Supra*, 2.2.1.4.

executives.⁵⁸ Were it not the case, rules set out in the 1980 DMA for parliamentary control of IGAs involving public expenditures, or which trench on the domain of the legislative branch, could simply be by-passed. In theory, therefore, agreements requiring legislative assent but which fail to secure it, cannot be considered to have normative force *erga omnes*.

One of the difficulties is that judicial control of such invalidity is restricted. If executives choose not to submit an agreement to their legislature, the Council of State would not proceed with an *a priori* control of the validity and constitutionality of the legislative instrument meant to approve the agreement. In the absence of a legislative instrument, the Court of Arbitration would not have jurisdiction to intervene *a posteriori* either.

In a number of judicial review cases, the administrative section of the Council of State (CSAS) seemed to have taken for granted the validity of an IGA which was never submitted to assemblies but which clearly bound third parties (it notably regulated the transfer of staff from the old Province of Brabant to a number of succeeding institutions).⁵⁹ The agreement's potential invalidity was simply not argued. Whether the CSAS could actually have annulled it remains unclear.⁶⁰ What it can do, however, is simply to treat what is considered to be an invalid agreement as "inexistent". It did so, for instance, with a "protocol" through which federal and Community governments agreed not to increase the number of beds in seniors' homes.⁶¹ The protocol was invoked by the Walloon Region to justify its refusal to authorise the extension of a particular institution. The CSAS first re-characterised the protocol as a cooperation agreement. It then noted that given the impact on third parties, legislative assent was required, failing which the protocol was without effect. The Court then annulled the decision refusing the authorisation.

A similar means of judicial control of such agreements – still untested – could arise in the context of a civil or criminal trial. If a party were to rely on an IGA that should have received legislative assent but did not get it, an ordinary court could simply refuse to apply it. It could not actually invalidate the IGA, but would also treat it as non-existent.⁶²

⁵⁸ CSLS 30.316 (26.09.2000) Doc Parl, CCF, 2000-2001, no.128/1 ; ANDERSON, Robert, NIHOUL, Pierre, "Le Conseil d'État : chronique de jurisprudence 2000", (2002)1 *RBDC* 17-133, 112.

⁵⁹ CSAS 81.996 (05.08.1999) (*Coppoy*).

⁶⁰ The CSAS can annul invalid regulatory and administrative instruments (s.14 CACS). Whether the Council of State has direct jurisdiction over bi- or multi-lateral administrative acts, as opposed to unilateral ones is unresolved: *infra*: 5.3.1 and 6.1.1.1 (notably discussion of CRASC case: CSAS 79.517 (25.03.1999)).

⁶¹ The Walloon legislation required that the executive take into account federal norms in granting authorisations. The CSAS ruled that this invalid agreement did not satisfy this requirement: CSAS 117.483 (25.03.2003) (*Résidence Harmonie*).

⁶² S. 159, *Constitution*. In the absence of a statute, ordinary courts could not, in this context, ask a "question préjudicielle" to the Court of Arbitration: 1989 DMA on the CA, s.26.

To summarise, in positive law, an agreement that meets the criteria for required legislative assent (and arguably, most do), but fails to secure it, is invalid. It does not have normative force *erga omnes*. It is undeniable, however, that a number of significant ones are in this category and enjoy a substantial degree of “para-legal” effectivity.⁶³

5.2.2 Parliamentary involvement and the status of IGAs in Canada

While in Canada, executives can bind themselves through IGAs without specific authorisation,⁶⁴ they may not bind third parties except through legislation. This is similar to the rule imposed in Belgium through s.92*bis*. A significant difference is the actual statutory language that is required for that purpose. The range of formulae that have been used by legislative assemblies to give various sorts of effect to contracts in general, and to IGAs in particular, is mystifying.⁶⁵ In the absence of a codification of drafting rules concerning parliamentary intervention, these must be gleaned from scattered, incomplete and occasionally inconsistent case law.⁶⁶ Drafting guidelines basically develop through trial and error. It is remarkable that the precise legal effect of the numerous legislative drafting techniques remains so elusive.

A good illustration of this uncertainty is provided by a number of judicial rulings rendered in the 1970s concerning vertical IGAs through which provinces adopted Anti-Inflation measures outlined in federal legislation. Unions in various provinces challenged the application of anti-inflation measures which, in some cases, modified collective agreements. They all argued that the IGA did not bind them. Following the terms used in this chapter, they challenged that the IGA had normative force *erga omnes*.

At least four different techniques were used to give effect to those IGAs in the provincial legal orders. In all cases, conclusion of the IGA was authorised by federal and provincial orders-in-council. The executives thus had undeniable authority (if additional confirmation was needed) to conclude them. The difference concerned the *a posteriori* means of approval. In Ontario, there was no statutory basis for the conclusion of the IGA, only the order-in-council authorised the conclusion of the agreement. The Ontario government argued that given the executive’s inherent common law capacity to make agreements, no legislative authorisation was actually required. A majority of the Supreme Court of Canada disagreed:

⁶³ *Infra*: General Conclusions.

⁶⁴ *Supra*, 4.1.2.1.

⁶⁵ Parliamentary endorsement of IGAs has a long history. The technique was adapted from the 19th century practice of endorsement of private contracts in the United Kingdom, and it was even used in the case of “constitutionalised” agreements: BANKES (1991) 811-813; BLACKMAN (1993) 50.

⁶⁶ BANKES (1991) 813-833 has proposed a fourfold classification of the impact of various parliamentary techniques used with respect to IGAs. In Australia, WARNICK (1982).

“The fact that the Crown can contract carries the matter no farther than that the contract may be binding upon it or that it may sue the other contracting party on the contract. What we have here is not a contract in this sense at all, but an agreement to have certain [federal] legislative enactments become operative as provincial law. [...]

It is one thing for the Crown in right of a Province to contract for itself, it is a completely different thing for it to contract for the application to its inhabitants, and to labour organizations in the Province, of laws to govern their operations and relations without statutory authority to that end. This would be, in effect, to legislate in the guise of a contract.”⁶⁷

What kind of statutory authority was then required to make the IGA binding on third parties and thus to transform it into a norm *erga omnes*? Manitoba relied on a general provision pursuant to which the government could authorize a minister to conclude IGAs, “for any benefit or purposes of the residents of Manitoba [...]”.⁶⁸ Another slim majority of the Supreme Court also considered this general authorisation insufficient to alter the laws of Manitoba. For the Court:

[...] s. 16 does no more than authorize the making of agreements [but does not imply that] such agreements once entered into will be effective to suspend the operation of other provincial legislation or constitute legislation binding on employees in the public sector. [...] If the section is to be read as giving legislative force to all agreements entered into [this would appear] to constitute a delegation of legislative power amounting to an abdication by the Legislature of its ultimate authority to pass laws, “for the benefit or purposes of the residents of Manitoba”.⁶⁹

British Columbia used a more complex route. A statute authorised the Minister, with approval of cabinet, to conclude an IGA concerning the application to the province of the federal Anti-inflation Act, regulations and guidelines, and “the manner and extent to which [they] shall apply to the [...] Provincial public sector.”⁷⁰ For the British Columbia Supreme Court, these precisions were sufficient to bind the latter.⁷¹ Finally, the statutory instrument used by Prince Edward Island seemed more satisfactory. Specific authorisation was granted to conclude the agreement and provided that the IGA was “binding upon the provincial

⁶⁷ *Re Anti-Inflation Act*, [1976] 2 SCR 373, 433 and 435 [*Anti-Inflation Reference*].

⁶⁸ *Executive Government Organization Act*, SM, 1970, ch. 17, s.16.

⁶⁹ *Re Manitoba Government Employees Assoc. v. Manitoba*, [1978] 1 SCR 1123, 1143.

⁷⁰ *Anti-Inflation Measures Act*, SBC, 1976, ch.1, s.5.

⁷¹ The BCSC's decision was largely founded on a *dicta* by Ritchie J. in the *Manitoba Anti-Inflation Reference*, which is not particularly convincing either: BANKES (1991) 824 and 833. BANKES challenges this ruling, noting that nowhere did the statute specify that third parties would actually be bound

sector” and “has the force and effect of an Act of the Legislature”.⁷² This did not give rise to court action.

The foregoing saga suggests the following guidelines for assessing the effect of various types of formulae used by legislative assemblies with regards to IGAs.

5.2.2.1 Parliamentary authorisation to conclude

While the executive does not require specific legislative authorisation to conclude IGAs, most statutes concerning particular Departments will explicitly authorise the Minister in charge to conclude them.⁷³ These remove any lingering doubt concerning the authority of signatories to conclude the agreement, but they do not predetermine the legal character of IGAs *erga omnes*.⁷⁴

5.2.2.2 Parliamentary approval and ratification

The statutory approval of an IGA - often scheduled to an Act - constitutes essentially the retrospective equivalent of statutory authorisation to conclude. It clarifies the authority to sign the agreement, but does not affect its status. In other words, an IGA that is “approved” does not normally thereby obtain the normative force of a statute. Governments do not incur statutory duties and the IGA is not binding on third parties. A recent Canadian decision even held that such language does not have the effect of altering existing regulations.⁷⁵

5.2.2.3 Parliamentary incorporation

In the Ontario *Anti-Inflation Reference*, Laskin C.J. drew a parallel between the requirement that international treaties be properly incorporated into domestic law to carry their effect in the Canadian legal order and the way in which an agreement had to be properly ratified by legislation in order to modify the legal order of the parties to that agreement.⁷⁶ As we shall see in Chapter 6, while the intersection between the Belgian domestic legal order and international law is a hybrid between monism and dualism, the Canadian approach is classically dualist.⁷⁷ What this implies is that international treaties – however specific their undertakings – will only be applicable in the Canadian legal order once they have been “incorporated” into the domestic legal order.

⁷² Cited in BANKES (1991) 828, fn 172.

⁷³ *Supra*, 4.1.2.1.

⁷⁴ *Ontario Anti-Inflation Reference* and *Manitoba Anti-Inflation Reference*. See also Lamer J., diss. On other issues, in 1994 *BC Railway case*, par. 23.

⁷⁵ *Unilever Canada Inc. v. A.G. Québec*, [1999] RJQ 1720 (SC) [the “Colour of Margarine case”].

⁷⁶ *Anti-Inflation Reference*, 433.

⁷⁷ *Infra*, 6.2.2.1.

Several techniques are used to give full effect, in the Canadian legal order, to international treaties.⁷⁸ One is simply to “translate” the content of the treaty into “regular” legislative provisions, which then become the formal legal source. Another is to provide that a treaty “is approved and has force of law”, or “has the force of law as if enacted in the present Act”. The treaty is then scheduled to the Act. A third consists in “incorporating” only a specific number of clauses from that international instrument. Only the incorporation of a treaty (or specific provisions of that treaty) through formulas such as “as if enacted” or “given force of law” will confer legally binding status to the content of the treaty.⁷⁹

Similar guidelines apparently apply to IGAs. It seems undeniable that only proper incorporation can alter the “domestic” legal order of any federal partner, so as to confer rights or impose obligations on third parties.⁸⁰ The difficulty is in identifying the proper terms that convey this incorporation. In other words, the major problem is technical: in the absence of clear guidelines, drafters have used all types of formulas that give rise, often decades later, to a variety of potential interpretations. The resulting uncertainty is bewildering, given the impact on the public law of members of the federation.

The 1994 *BC Railway* case examined in Chapter 4 is a good illustration. After denying that the 1883 federal-provincial IGA and the companion federal/railway company agreements were of a constitutionalised character, the Supreme Court examined whether the latter had statutory value.⁸¹ The agreement had been “ratified and adopted” and was not specifically given force of law.

The majority of the Supreme Court denied that a magic formula determined whether an agreement was given statutory force. Statutory rules of interpretation had to be used to ascertain the meaning of the legislative wording.⁸² The majority concluded, however, that in the absence of evidence that the parties intended to incorporate an agreement, expressions such as “ratified and confirmed” were likely to be insufficient.⁸³ The Court noted, for instance, that several clauses from the companion agreement had been replicated into the ratifying Act. For the majority, such repetition was inexplicable if the Agreement was to have statutory

⁷⁸ *Entreprises de rebus Sanipan v. Québec*, [1995] RJQ 821 (CS) 844-847.

⁷⁹ LOUNGNARATH, Vilaysoun, “Quelques réflexions d’ordre juridique sur la clause d’adhésion de l’ALÉNA”, (1995) 40 *McGill L.J.* 1-54, 16-17.

⁸⁰ LOUNGNARATH, Vilaysoun, “Le rôle du pouvoir judiciaire dans la structuration politico-juridique de la fédération canadienne”, (1997) 57 *R. du B.* 1003-1045, 1034.

⁸¹ The focus was on the federal-private contract because this is where the undertaking to operate the railway line “continuously” was located. If that agreement had statutory status, the federal government could not have abolished the line without special legislation by virtue of the wording of the *Railway Act*.

⁸² For a case in which statutory ratification was held to have an incorporating force: *Cree Regional Authority v. Canada (Federal Administrator)*, [1991] 3 FC 533 (FCA).

⁸³ In so ruling, the Court dismissed what it described a “passing remark” by Lord Haldane, who had described the agreement as having “statutory authority”: *Esquimalt and Nanaimo Railway v. Treat*, [1919] 3 WWR 356 (PC): *BC Railway decision*, par. 171.

value as such. The Court rejected the Court of Appeal's conclusion that given the constitutional significance of the arrangement, it seemed reasonable to infer that Parliament had had the intention of – at least – conferring statutory value to the agreement, despite the language used.

The analogy between the dualist character of the Canadian legal system with regards to international agreements and the status of IGAs was reiterated recently in a case concerning the Internal Trade Agreement (ITA).⁸⁴ While that case dealt with a contradiction between an IGA and a Québec regulation, the Court's reasoning is apposite here.

In the *Colour of Margarine* case, a margarine producer argued that a Québec regulation prohibiting the sale of margarine that has the colour of butter violated both North American Free Trade Agreement and the ITA. Both were merely "approved" by every Canadian legislative assembly.⁸⁵ The Superior Court of Québec ruled that neither had the effect of altering the Québec legal order. The judge noted the absence of any express provision in the ITA stipulating that it had precedence over existing regulation or legislation, or even current administrative practice. He concluded that the Act approving the ITA did not take precedence over the Act pursuant to which the regulations on margarine had been approved.⁸⁶

To sum things up, statutory incorporation undoubtedly confers statutory force upon an IGA. Doubt persists, however, on the precise terms required to effect such an incorporation. The phrases "as if enacted in this Act" or "the agreement is hereby given the force of law" almost unquestionably indicate this result. The expressions "is approved" "is accepted" or "is ratified" create a strong presumption that the IGA is validated by the assembly, but not incorporated. This presumption is rebuttable, although the Supreme Court's approach in the *1994 Railway* case suggests this would not be easily accomplished. This rebuttable presumption maintains, however, a degree of uncertainty regarding the effect of particular statutory language on the status of IGAs.⁸⁷

⁸⁴ The *Colour of margarine* case.

⁸⁵ *An Act Implementing the Internal Trade Agreement*, SC 1993, ch. 44; *An Act Respecting the Implementation of the Agreement on Internal Trade*, SQ 35.1.1.

⁸⁶ Had the ITA been properly incorporated, rules of statutory interpretation could have been required to resolve the contradiction between the two legal texts. As it was, one was not deemed part of Québec law.

⁸⁷ No doubt the Court wanted to leave open the possibility that the "approving" or "ratifying" language could in some circumstances imply an incorporation. In the absence of any clear drafting guidelines, and in view of the old history of such parliamentary endorsement, too rigid a rule of interpretation could have unanticipated effect on long-standing arrangements. Unfortunately, the Court's prudence brings its share of uncertainty. For example where mere approval of IGAs was held not to "breathe life into" an IGA: *Segunda* case.

5.2.2.4 Parliamentary appropriation

These various methods of parliamentary intervention must be distinguished from the constitutional principle pursuant to which expenditure of public funds by the executive must be authorised by legislation. As we saw, in Canada, this is a necessary condition for spending public funds, but it is not determinative of the legal character of an IGA *inter partes*.⁸⁸ Similarly, the approval of spending incurred through an IGA does not have the effect of conferring any legal character *erga omnes* unto it.

As we saw, in Belgium also public expenditures must be approved by the relevant legislature. This is done through general budgetary appropriation. What s.92*bis* adds is an obligation to specifically submit cooperation agreements that have financial implications to the relevant assemblies. In other words, IGAs with financial implications require some form of parliamentary action in both countries. The difference, however, is in the degree of specificity. In Belgium, the agreement itself must be submitted to legislative assemblies. In Canada, appropriation can be made in very general terms and parliamentarians generally ignore the details of IGAs when they vote the necessary credits.

In conclusion, statutory prior authorisation, approval/ratification, and incorporation through the “as enacted” formula all have the effect of removing any doubt as to the authority of a signatory to bind the order of government party to an IGA. Only the “as if enacted” or “given the force of law” formulations have the undeniable effect of transforming IGAs into norms capable of binding third parties.

5.3 IGAs having regulatory status

When agreements are “constitutionalised” or properly approved by legislation, they inherit a specific legal value from those constitutional or statutory norms. In neither Belgium nor Canada are there clear constitutional or even statutory directions concerning the status of IGAs that are not given constitutional or statutory value in such a way. The foregoing would suggest that without proper assent or incorporation, such IGAs are simply devoid of legal character *erga omnes*.

Indeed, neither the Canadian case law nor the doctrine suggest that IGAs which are not given force of law by statutory incorporation could nevertheless be characterised as regulatory instruments: the *Colour of Margarine* case discussed above actually stands for the

⁸⁸ *Supra*, 4.1.2.3.

contrary.⁸⁹ While the analysis on this front is very sketchy in Belgium, a few authors affirm that IGAs that do not obtain legislative assent have the normative force of regulatory instruments.⁹⁰ I find these assertions, which are never explained, quite mystifying. One may well question the interest of characterising an agreement as having regulatory force, if they cannot bind third parties.

It appears that these analysts' main concern is not to establish the legal force of such IGAs, but rather to place them above unilateral normative instruments in the hierarchy of norms.⁹¹ For instance, UYTENDAELE posits that IGAs that do not require legislative assent must have some sort of "supra-regulatory" status, so as not to be vulnerable to contrary regulatory instruments.⁹² He does not address the character of the agreements *per se*. In other words, the characterisation is teleological (and ideological): since IGAs should be protected from contrary executive acts, they must have some form of legal force. They must at least be equivalent to the first rung in the ladder of legal norms, which are regulatory instruments.

Over and beyond this instrumental characterisation, it is worth reflecting on whether IGAs could have some legal force *erga omnes*, even when they cannot bind third parties, *per se*. For while third parties are not formally bound by such IGAs, they could eventually derive some benefit from them. Similarly, it may be that an IGA that is characterised as a regulatory instrument could become a legal benchmark to assess the validity of administrative action. It may very well be easier to challenge a refusal to recognise one's diploma through administrative law process - when an IGA guarantees that recognition - than to argue that the IGA as a contract between two governments contains a "*stipulation pour autrui*" to that effect.

Finally, and this takes us somewhat outside the realm of positive law, this characterisation may be a better account of what a number of IGAs actually do. Just as governments seek to impose rules without going through the procedural hoops of adopting formal regulations, notably through the adoption of circulars or directives, it appears that they can jointly conclude IGAs that, while incapable of officially binding third parties, play an undeniable normative function. In this sense, while they do not officially have the force of statute, they seem to play a similar role to regulatory instruments.

⁸⁹ *Supra*, 5.2.2.3.

⁹⁰ COENRAETS (1992) 168 and (1998) 92; de WILDE (1990) 112.

⁹¹ *Infra*, 6.1.2.

⁹² UYTENDAELE (2001) 871.

5.3.1 IGAs of a regulatory status in Belgium

In Belgium, s.92*bis* of the 1980 DMA only specifies which cooperation agreements require legislative assent. It does not actually define or describe the remaining ones. In Parliamentary debates, the Minister in charge of institutional reform described them as “agreements with an administrative or regulatory content”, without further clarification.⁹³ In 1988-89, the main concern was with the potential impact of compulsory agreements on the hard-won autonomy of federated entities and on dispute resolution mechanisms, rather than on the character of the agreements *per se*.⁹⁴

Today, federal authorities apparently still share the hesitation or prudence expressed in 1988 by the federal Minister concerning the status of those instruments. For instance, in federal Acts approving annual budgets, spending related to cooperation agreements is not included in the list of legal or regulatory sources of spending, but in the nondescript “other” category.⁹⁵ MOERENHOUT argues that the terms “administrative” or “regulatory” are meaningless in this context, and cautiously avoids defining the residual category of agreements that do not require legislative assent.⁹⁶ In his treatise on “*le contentieux administratif*”, LEROY does not even consider whether cooperation agreements *could* be characterised as regulatory instruments (“*règlement*”) so as to act as a standard for the validity of administrative action.

As we saw above, certain authors, notably UYTENDAELE, qualify IGAs which do not require legislative assent as “*règlementaires*”. This is essentially done, however, to protect them against unilateral regulations, and not as a result of an analysis of the actual normative force of such IGAs.⁹⁷ GARCIA MORALES also contends that agreements that do not receive legislative assent have the same normative force as regulatory instruments.⁹⁸ Her reasoning seems to be that since they are (*ex hypothesi*) legal instruments, they are necessarily obligatory. Consequently, they must have similar legal force as other obligatory non-legislative instruments of general application, that is, “*règlements*”. Since regulatory instruments require some statutory foundation, this would presumably be s.92*bis* itself.

In fact, the whole construction rests on the premise that all cooperation agreements are – necessarily - of a legal character. In Belgium, there are strong political and ideological groundings for seeking a legal characterisation of the instrument,⁹⁹ even when they are quite

⁹³ Doc Parl Senate, SE 1988, 405/2, 47.

⁹⁴ ALEN and PEETERS (1989) 366-367.

⁹⁵ Exposé général du budget 2004, 31.10.03, Doc Parl, Ch 0323-001, 438.

⁹⁶ Interview with author.

⁹⁷ UYTENDAELE (2001) 871.

⁹⁸ GARCIA MORALES (1998) 144.

⁹⁹ *Infra*, General conclusions.

distinct from “normal” regulatory instruments. In other words, the reasoning is not “let’s see if these political agreements can qualify as legal ones”, but rather “since they are legal instruments, and cannot have the value of statutes, they must be regulatory instruments”.¹⁰⁰

Assuming that the characterisation of IGAs as regulatory instruments is possible, they should not – in theory – bind third parties.¹⁰¹ They could only have legal force between governments, or create *rights* for third parties. This is admittedly a strange twist on a characterisation of an IGA as a normative instrument *erga omnes*, but perhaps defensible.

As mentioned above, the advantage which third parties could derive from the characterisation of an IGA as a regulatory instrument is twofold. First, it would allow them to invoke it, as a source of law, before any court. Secondly, it would reinforce the judicial review of administrative action taken in pursuance or in contradiction to such IGAs. In the absence of any relevant case law, let us take a hypothetical scenario concerning an existing agreement between the German-speaking and the French Communities. It provides for the placement of youth from one order of government in institutions falling within the jurisdiction of the other.¹⁰² This is in derogation to the strict application of territorial limitations, and the agreement was not submitted to legislatures.¹⁰³ Arguably, a Community’s social services could seize the Council of State of the refusal by the other Community to admit a particular youth in need of services on grounds that this violates the agreement. If the latter is considered a “regulatory instrument”, it is by definition a legal source, and its violation justifies the annulment of the administrative decision.¹⁰⁴ As the following discussion shows, this potential judicial avenue is not without difficulties.

If cooperation agreements can be characterised as a form of regulatory instrument, the diversity of their content does not, in my view, support the conclusion that they should all be. This would require a characterisation *in concreto*, using administrative law criteria for the existence of such instruments. As in the case of the indicia-test applicable to the

¹⁰⁰ No one suggests that they are formally “*arrêtés*” (that is subordinate legislation). They clearly do not meet the required format or procedure for this, and would have to be submitted to the CSLS, which they are not (unless they are introduced by a legislative instrument, but that takes us away from the present hypothesis). The vaguer qualifier of “*réglementaire*” is chosen. There does not seem to be a difference in legal force, however, between “*actes réglementaires*” and “*arrêtés*”. For the distinction: *supra*, introduction to this Chapter.

¹⁰¹ See however, CSAS 81.996 (05.08.1999) (*Coppoy*) concerning the agreement on the transfer of competences from the Brabant province.

¹⁰² Accord sectoriel en matière d’aide à la jeunesse (Fr C + GC), 27.04.01 (21.09.01).

¹⁰³ Since citizens are entitled to services by their “own” government, could a youth being placed in an institution under the responsibility of another Community challenge the placement, on grounds that s/he is not bound by the agreement in the absence of legislative assent?

¹⁰⁴ This could be a way of circumventing the exclusion of IGAs as “*formalités substantielles*” in s.14bis CACS. In other words, while there is an explicit exclusion of one ground of judicial review, this leaves open the even wider “*violation de la loi*” ground of review.

characterisation of IGAs as contractual instruments, some would pass muster, others would not.

Voluminous academic and judicial analysis has been devoted to the distinction between regulatory instruments and non-legally binding texts that emanate from governmental authorities.¹⁰⁵ Schematically, the content of a regulatory instrument must be general and impersonal, in the sense that it is susceptible of applying to an unlimited number of situations.¹⁰⁶ This is likely the case of most cooperation agreements.¹⁰⁷ It must also be obligatory, that is, its application must not be discretionary. Clauses which leave a very wide degree of discretion to the parties in the way in which the agreement is to be implemented may not qualify. There is no reason why protocols drafted in sufficiently normative terms could not also be recharacterised as regulatory instruments. This re-qualification would be similar to the characterisation of certain ministerial circulars as regulations.¹⁰⁸ The terms used by drafters to designate such an instrument are not considered determinative to its legal characterisation.¹⁰⁹

An additional difficulty lies in the fact that, as a rule, regulatory instruments must be submitted to the legislative section of the Council of State prior to their coming into force. IGAs never are, unless they are introduced through a legislative instrument, which is of course, not the situation considered here. It may be that an IGA could cross the threshold and be considered a regulatory instrument, only to be declared invalid for not having been submitted to the *a priori* scrutiny of the Council of State. It is arguable that this requirement does not apply to cooperation agreements, which are not explicitly included in the list of norms over which the CSLS has jurisdiction.¹¹⁰ This is another unresolved issue. Of course, having an IGA characterised as a regulatory instrument, which would immediately be held invalid would be cold comfort for the party that relied on it as a source of law. The impact would essentially be political or pedagogical: such judicial pronouncements signal that

¹⁰⁵ MAST (1989) 36; QUERTAINMONT (2000); De ROY (2002); ERGEC (1998).

¹⁰⁶ LEROY (2000) 172.

¹⁰⁷ However, an IGA that is simply used to designate specific members to a board, could be considered an individual decision, rather than an "*acte réglementaire*": for exemple, the 2001 amendement to a 1990 agreement: AC portant création, composition et règlement de la Commission intercommunautaire de contrôle des films (3C), 21.12.89, 27.12.90 (20.03.90, 20.04.91) ; 03.10.01 (07.12.01).

¹⁰⁸ Circular of 09.10.1997 recharacterised as regulatory: BLÉRO, Bernard, "A propos de quelques circulaires du Ministre de l'Intérieur en droit des étrangers: nature et valeur du procédé" (1998) 99 *Revue du droit des étrangers* 297-316, 313. Also: LEROY (2000) 188.

¹⁰⁹ BLÉRO (1998) 298.

¹¹⁰ S.3 of the Coordinated Act on the Council of State talks of "*arrêtés*". A parallel could be drawn with the position of the CSLS that until legislative acts adopted by the COCOF were explicitly included in that provision, the Council of State did not have the jurisdiction over them, while it did concerning the legislative instruments of every other order of government: CSLS 22.977/9, Doc Ass COCOF 1993-1994, no. 62/1.

the executives attempted to use an illegal instrument to introduce legal rules. In States founded on the rule of law, the statement has, arguably some value.

Assuming that an IGA has a sufficiently normative content to be considered a regulatory instrument, yet is not invalid for violating s.92*bis*, or for failing to be submitted to the CSLS, the obstacle course is not yet over. Another procedural hurdle to its use as a benchmark for judicial review arises. It relates, this time, not to the jurisdiction of the CSLS, but of its administrative counterpart, the CSAS, acting *a posteriori*.

S.14*bis* of the Council's organic legislation explicitly excludes agreements as "substantial formalities", the violation of which normally leads to the invalidity of an administrative act. This means that IGAs cannot serve as "norm of control" to test the validity of unilateral administrative decisions or act, at least from that particular angle.¹¹¹ It may be however, that by recharacterising an agreement as a regulatory instrument, another ground of review, the wider "*violation de la loi*" would be available.¹¹² As the expression indicates, this ground of review implies that a public authority acts in contradiction to a legal rule, which an IGA *qua* regulatory instrument would be.

This would require a clarification of the CSAS's jurisdiction over an instrument of a bi- or multi-lateral source, by contrast to its classic jurisdiction over unilateral ones. This is not impossible: the CSAS has extended its jurisdiction over contract-type instruments by recasting them as regulatory ones, when a functional test revealed their regulatory function.¹¹³ However, the CSAS's jurisdiction over cooperation agreements is not entirely resolved. Without clarifying its own jurisdiction directly, in a number of cases, the CSAS has assessed the legality of administrative decisions taken pursuant to IGAs.¹¹⁴ Worthy of note is the fact that in several of these cases, the IGA in question should have received legislative assent, but had not.¹¹⁵ In one of rare cases in which the Council's jurisdiction was directly

¹¹¹ CSAS 94.766 (19.04.2001) (*Société anonyme Sablière*). An application to have regulation limiting heavy traffic in the WR annulled on grounds that given its impact in Flanders it should have been the object of a cooperation agreement was rejected. This was not truly an action in judicial review using an IGA as a benchmark, since there was none. But, to my knowledge, it is the only direct pronouncement of the CSAS on its own jurisdiction concerning IGAs, and this pronouncement is not definitive since only one ground of review was considered.

¹¹² "*Loi*" in this case includes any rule of law, and thus includes regulatory instruments: LEROY (2000) 363-367.

¹¹³ This was the case of collective agreements. An Act was then adopted to explicitly deprive the CSAS of this jurisdiction: LEROY (2000) 190-91. An Act also specifically provides that so-called "*contrats de gestion*" do not constitute regulatory instruments, thus depriving the CS of a jurisdiction which it might otherwise have found for itself: in DE ROY (2002) 396. In France, such instruments have been characterised as regulation: QUERTAINMONT (2000) 46-47.

¹¹⁴ The question of the Council's jurisdiction was apparently not argued.

¹¹⁵ In my view, this lack of assent should have rendered those agreements invalid, since third parties were clearly bound. See: CSAS 54.013 (23.06.1995) (*Vereecken*); CSAS 81.996 (05.08.1999) (*Coppoy*) and CSAS 114.610 (17.01.2003) (*Société coopérative du logement*) concerning the transfer of staff from the Brabant province. See also CSAS 62.607 (17.10.1996) (*Boonen*) regarding the

raised, it deftly avoided the issue. The application for judicial review was directed at an Annex to a cooperation agreement. The Council ruled that the Annex, which authorised a number of associations to monitor sexual offenders, was a unilateral instrument by the federal Minister of Justice, who had simply joined it to the agreement for informative purposes.¹¹⁶ Hence, the Council's jurisdiction was established in "traditional" form and the Council's jurisdiction over the agreement circumvented.¹¹⁷

Interestingly, there may be an interest for government parties to seek to have an IGA characterised as a regulatory instrument. This flows from the optional dispute resolution mechanism applicable to optional agreements. Assuming a dispute arises concerning some decision taken by an executive that runs counter to an IGA, other parties could seize a cooperation tribunal, assuming one is created. If this is not the case, an aggrieved government could seek to have the decision annulled by the CSAS. Of course, all of the above hurdles would apply, *mutatis mutandis* to this scenario as well.

The obstacle course is arguably very heavy for potentially very little result. To qualify as a regulatory instrument, an agreement would first have to be of a general and abstract character, have normative content, yet neither involve public funds or bind third parties (otherwise, it would violate s.92*bis*). The validity of such a recharacterised agreement would depend on a conclusion that – by derogation to other forms of regulatory instruments – it does not require an opinion by the CSLs. Then, assuming it is invoked before the CSAS to challenge a unilateral decision taken in contradiction with it, the CSAS would have to provide a generous interpretation of its own jurisdiction.

To summarise, the main advantage flowing from the recharacterisation of IGAs which do not require legislative assent as regulatory instruments lies in the judicial review to which administrative action that runs counter to an IGA could be subjected. This is true *inter*

refusal of a permit to build: the 1993 Brussels agreement was not truly the norm of control, but is clearly "in the background". The absence of assent goes unnoticed.

¹¹⁶ The Annex contained a list of associations selected to monitor sexual offenders. The designation was challenged by an association that was not retained.

¹¹⁷ CSAS 79.517 (25.03.1999) (CRASC). Even more complicated in this case was the fact that the agreement in question was to be submitted to legislative assent. As soon as this was obtained, the CSAS would in any event lose jurisdiction to the benefit of the Court of Arbitration, since a legislative instrument would be involved: *infra*, 6.1.1.1. In my view, had the CSAS sought to review not the Annex but the agreement itself, it would have had either to decline jurisdiction, or to note that the agreement was without legal effect, until assent was given. In fact, after the agreement received assent, its constitutionality was challenged before the Court of Arbitration, which also held that the Annex was not part of the agreement, that it had therefore not been the object of assent, and that the Court did not, therefore, have jurisdiction over it! In other words, by treating it as distinct from the agreement, the CSAS established its jurisdiction over it, while the Court of Arbitration declined its own jurisdiction. A more compelling analysis of the CSAS's jurisdiction is provided in 81.996 (05.08.1999) (*Coppoy*) in which the Council treated as "inexistent" an administrative decision that countered an agreement which never received legislative assent. The case contains no direct discussion regarding the Council's own jurisdiction.

partes, if a cooperation tribunal is not set up to resolve a dispute. But it is probably even more significant for third parties. Hurdles are numerous though, and the end-result still unclear. One cannot assert with certainty that IGAs can never be characterised as regulatory instruments, any more than one can assert that every IGA which does not require legislative assent necessarily has this status.

5.3.2 IGAs having regulatory status in Canada

According to the positive law orthodoxy exposed earlier, Canadian IGAs can only alter the domestic legal order of any federal partner if they are expressly granted the force of law through some form of statutory incorporation.¹¹⁸ In this context, any potential recharacterisation of IGAs as regulatory instruments appears superfluous. Once more, what could possibly be the advantage of considering as regulatory an instrument which does not bind third parties? Yet, the possibility that IGAs could constitute some form of regulatory instruments, when they are not so incorporated, also deserves some attention.

On a preliminary note, it does not appear that IGAs could constitute formal regulations (Canadian “*règlements*”) any more than Belgian cooperation agreements could constitute formal regulations (“*arrêtés*”). It is more likely that, if they are recharacterised, it would be along the lines of directives or circulars, which Canadian courts have occasionally treated as regulatory instruments.¹¹⁹ The analysis proceeds *in concreto*, essentially by examining the text’s normative content. The difference between regulations and other types of regulatory instruments is largely a matter of procedure and authority to adopt.¹²⁰ Both, however, require some statutory foundation, and once adopted, they have the same normative force, that is, they are (normally) legally binding on their “addressees”.

For executives, the interest of adopting apparently “informal” rules – such as directives or IGAs that do not qualify as legal instruments *erga omnes* – is double. It limits entitlements that come with instruments of a legal character, and judicial review concerning their validity.¹²¹ Conversely, the interest for third parties should be to consolidate such entitlements, and to be able to challenge administrative decisions taken in contradiction with an agreement. The question is obviously whether bi- or multilateral agreements can be characterised as regulatory instruments, which are traditionally unilateral law-making devices. The problem is even more crucial given the absence of any provision equivalent to

¹¹⁸ *Supra*, 5.2.2.3.

¹¹⁹ For these, the Court used the concept of quasi-regulatory instruments: *of the Old Man River v. Canada*, [1992] 1 SCR 3, 36; ISSALYS and LEMIEUX (1997) 489-520; HOULE (2001) 13-109.

¹²⁰ *Statutory Instruments Act*, RSC (1985) ch. S-22.

¹²¹ MOCKLE (2002) 149.

s.92bis which can at least provide some legal starting point for the argument that governments can regulate jointly.

In the *Colour of margarine* case examined above, the Québec Court of Appeal expressly denied that an agreement that had been approved by statute, but not incorporated, could provide a benefit unto third parties.¹²² A company had notably argued that a Québec regulation contravened the *Internal Trade Agreement*. The Court disagreed. Applying the analogy with the intersection between the domestic and international legal orders, it gave a classic dualist reading of the impact of IGAs. Without statutory incorporation, neither an international agreement nor an IGA can alter the domestic legal order. This implies that such an IGA may not impose obligations on third parties,¹²³ but also that it cannot be the source of rights for parties other than the governments who concluded the agreement (and this, through the contractual prism). In other words, only traditional unilateral norms can generate rights for third parties, or impose obligations on them.¹²⁴

If this analysis is correct – and it is certainly consistent with the classic understanding of law-making in Canada - the only remaining interest that the recharacterisation of IGAs as statutory instruments could have for third parties would be in terms of judicial review of administrative decisions contravening such IGAs. As in the Belgian context, voluminous administrative law analysis is devoted to identifying criteria pursuant to which instruments which are not formally “*règlements*” can nevertheless be considered to be of a legal character, and thus cross the threshold of juridicity *erga omnes*.¹²⁵ Those criteria are very similar to those applicable in Belgian public law: they must have some statutory grounding, be obligatory and susceptible of regulating an indeterminate number of situations. Classically – and unsurprisingly – they are also understood to be “unilateral”.¹²⁶

Assuming this “unilateral” criteria could be lifted and that some IGAs met criteria for re-characterisation as regulatory instruments, judicial review of administrative action taken in contradiction with such IGAs would face a major procedural hurdle flowing from the dual character of the Canadian judicial system.

¹²² The *Colour of Margarine* case: *supra*, 5.2.2.3. Also: *Manitoba Fisheries Ltd. V. R.*, [1979] 1 SCR 101, 117.

¹²³ In the *Anti-Inflation Reference*, the Supreme Court had held that IGAs could not generate obligations for third parties unless there were incorporated. It did not address the issue of rights.

¹²⁴ See also: *Re Lofstrom and Murphy et al.*, (1971) 22 DLR (3d) 120 (SKCA); *supra* 4.1.3. Oddly, in the last of the *Finlay* cases, the Supreme Court reviewed the conformity of Manitoba’s policy of recouping overpayments from social assistance benefits recipients with own legislation as well as the federal-provincial Agreement in the Canada Assistance Plan. However, it does not provides any analysis of that agreement’s status. In the end, the Court found no violation. The minority did, but still failed to characterise the agreement: *Finlay v. Canada (Minister of Finance)*, [1993] 1 SCR 1080.

¹²⁵ GARANT (1996) 395-401; ISSALYS and LEMIEUX (1997) 489-520; HOULE (2001) 13-109.

As was briefly explained in Chapter 1, the actions of federal officials are reviewable by the Federal Court, while the actions of provincial officials are reviewable by provincial Superior Courts.¹²⁷ While s.19 of the *Federal Court Act* provides a forum for resolving intergovernmental "controversies",¹²⁸ it is not open to third parties. There is no equivalent judicial organ for challenging joint decisions by governments, or decisions made by bodies created through IGAs.¹²⁹ Judicial review of actions taken pursuant to IGAs must be rattaché, somehow, to one order of government. Applications for judicial review of such decisions are regularly dismissed for having been filed in the wrong Court.¹³⁰ In fact, even when Courts do conclude that they have jurisdiction, the degree of uncertainty generated for affected members of the public in this regard is astonishing.¹³¹

As between parties, it may be that the recharacterisation of an IGA as a regulatory instrument presents even less interest in Canada than it does in Belgium. This is because if a Canadian IGA constitutes a contractual instrument *inter partes*, there will necessarily be a court of competent jurisdiction to deal with a dispute involving its interpretation or violation.¹³² As we saw, this is not necessarily the case in Belgium, since parties to an optional cooperation agreement may disagree on the creation of a cooperation tribunal. In that case, a finding that an agreement constitutes a "regulatory instrument" could ground the jurisdiction of the Council of State to intervene.

In the end, the characterisation of IGAs as regulatory instruments seems as unlikely to succeed in Canada as it does in Belgium.¹³³ As the following will show, this is in sharp contrast with the strong impression one gets from reading administrative law decisions in which IGAs are conceived as an integral part of complex regulatory schemes.

Given the absence of an equivalent provision to s.92*bis*, federal partners in Canada cannot adopt *erga omnes* legal rules that are "directly applicable". Instead, they construct

¹²⁶ *Re Manitoba Language Rights*, [1992] 1 SCR 212; HOULE (2001) 16 ff.

¹²⁷ *Supra*, 1.2.3. Note, however, that when a provincial body acts on behalf of the federal government, in principle, judicial review proceeds before provincial judicial organs: s.2(1) *Federal Court Act*, RSC (1985) ch. F-7 ; See comments and cases cited in SGAYIAS, David et al., *Federal Court Practice*, (Toronto/Montréal: Carswell, 2002), under s.2.

¹²⁸ *Supra*, Chapter 4.

¹²⁹ For similar conclusion regarding Australia: SAUNDERS, Cheryl, "Administrative Law and Relations between Governments : Australia and Europe Compared", (2000) 28 *Fed LR* 263-290.

¹³⁰ Eg: *Canadian Restaurant and Food Services Association v. Canadian Dairy Commission*, [2001] 3 FC 20 (FCTD) [*the Restaurant case*].

¹³¹ Eg: *Secunda case* in which the federal government challenged the Nova Scotia Supreme Court's jurisdiction on the basis of a clause contained in an IGA.

¹³² Despite difficulties involving inter-jurisdictional immunities: POIRIER, *Cross-roads*.

¹³³ Another issue which would need to be canvassed relates to the authority of signatories to IGA to adopt regulatory instruments. In many cases, Ministers are expressly authorised to adopt such norms as well as to conclude IGAs, so that the recharacterisation would not be problematic from that perspective. The problem of authority would arise in cases of IGAs concluded by civil servants, for instance. On authority of Ministers: LORDON et al. (1992) 21-25.

cooperative arrangements through parallel and complementary Acts and regulations and delegate administrative and regulatory powers to one another. The fulcrum between those intertwined unilateral instruments is frequently an IGA, or even a series of IGAs. It is often difficult to sustain that the source of formal normativity lies only in those regulations or Acts: IGAs are clearly part of the normative apparatus. The result is often a tangle of legal sources, which courts do not necessarily insist on disentangling. For instance, the Supreme Court of Canada has held that when officials derive their authority from both federal and provincial sources, they do not need to expressly identify the source of this authority. The Court justified a lower degree of accountability on grounds of efficiency.¹³⁴

One illustration of the interwoven legal sources, in which IGAs are an integral part, will suffice. The fact pattern is undescribably convoluted, and the following is an oversimplification. In Canada, federal authorities are responsible for the international and interprovincial aspects of trade, while provinces are competent over the intra-provincial facet. To articulate these interconnected competences, federal and provincial authorities resort to circuitous arrangements replete with interdelegation.¹³⁵ This is notably the case of the trade and marketing of dairy products. This has given rise to a web of criss-crossing federal and provincial legislation, regulations, formal IGAs, complemented by Memorandum of Understandings and Addenda.¹³⁶ A number of interprovincial and federal-provincial bodies are instituted, as well as federal and provincial boards which can delegate functions to one another. IGAs stand at every corner of this labyrinth.¹³⁷

One of the numerous intergovernmental bodies set up through an IGA, is in charge of setting pan-Canadian policies and quotas regarding certain dairy product. A company was repeatedly refused a permit to purchase a certain type of cheese. Given the enterprise's pan-Canadian activities, seeking redress before a single provincial court seemed problematic. It thus seized the Federal Court, which, in an undescribably labyrinthine decision, ended up concluding that the body derived no power from federal legislation or regulations, despite the fact that its decisions partly fell within federal jurisdiction. In fact, the Committee had been granted powers by provincial milk boards which had themselves been delegated powers from a federal body. For the Court, this round-about game of authorisation and delegation was clearly insufficient to assert federal filiation and it declined

¹³⁴ *BC (Milk Board) v. Grisnich*, [1995] 2 SCR 895. The Court added, somewhat more convincingly, that requiring that the source of authority be identified would only lead to detailed references to every possible source of power, which would not actually improve accountability.

¹³⁵ *Supra*, 1.2.4.4.

¹³⁶ *The Restaurant case*. For other examples of the "fiction" of unilateral action in the context of joint action: *Moresby Explorers Ltd v. Canada*, [2001] 4 FC 591(FCTD).

¹³⁷ I counted at least six of them.

jurisdiction on grounds that the body had been "created by contract", not under a federal statute.¹³⁸

The Court did not characterise the decisions made by the Committee in question. It simply ruled that it did not have jurisdiction over it.¹³⁹ Yet, the Court's assertion that the whole intergovernmental scheme was meant to "regulate [dairy products] in a seamless way" is revealing.¹⁴⁰ The Committee, presumably created "by contract" clearly played regulatory functions. There is no doubt that the decisions made by this "contractual body" bound the entire dairy industry, including the affected company. Denying that this is regulatory is counter-intuitive. If such decisions do not bind third parties, the entire scheme falls apart: the very imposition of quotas and the permit system flows from these IGAs.¹⁴¹ This certainly strikes as "regulating by contract".

In fact, it is difficult to identify a pattern in administrative law decisions involving IGAs. On the one hand, when they have to resolve procedural issues, notably regarding their own jurisdiction, Canadian judges tend to revert back to the fiction that sources of normativity are unilateral (even if parallel or complementary), since this is the only way in which their jurisdiction can be established.¹⁴² Similarly, when there is a direct challenge between a unilateral instrument and the content of an IGA, the former will normally be given precedence.¹⁴³

On the other hand, Courts tend to show a great deal of deference to cooperative schemes. While this is never asserted point-blank, it is difficult to understand a number of rulings unless one admits that IGAs are treated as normative instruments. The following decision is a good illustration. The Nova Scotia Supreme Court ruled that an entire "joint regulatory scheme" concerning offshore resources and safety (again, made up of a maze of legal sources, including several IGAs) superceded provisions of the *Federal Court Act*. The crucial provisions which purported to establish this precedence were contained in an IGA.

¹³⁸ That is, the Court understood its jurisdiction to require that the body be directly created by a federal statute.

¹³⁹ Cryptically, in the second to last paragraph, the Court simply states that the question of whether it derived valid powers from provincial sources was not before it.

¹⁴⁰ *The Restaurant case*, par. 4

¹⁴¹ For similar findings: *Fédération des producteurs de volailles du Québec v. Monette*, 505-05-002793-963 (20.02.1997) (SCQ); *Fédération des producteurs de volailles du Québec v. Pelland*, 705-05-004614-007 (01.11.2001) (SCQ). By analogy: *Canada v. Inuit Tapirisat*, [1980] 2 RCS 735: depending on terms of statute creating an administrative agency, it can have powers that are legislative in nature.

¹⁴² At least with regards to the Federal Court, which only has attributed jurisdiction.

¹⁴³ *BC Egg Marketing Board v. Sprucewood Farms Ltd*, BCSC A902400 (canlii), 11; *Martinoff v. Canada*, [1994] 3 FC 33 (FCA); In *Ontario (Chicken Producer's Marketing Board) v. Canada (Chicken Marketing Agency)*, [1993] 1 FC 116, in which the FCTD held that an intergovernmental board could not impose penalties on governments, unless it was clearly authorised by legislation or regulation to do so.

Oddly, the Court considered that this IGA was devoid of legal character both *inter partes* (for lack of specificity) or *erga omnes* (finding that the approving “statutes do not breath life into it”). Yet, the Court could not have reached its conclusion on jurisdiction without the IGA. In this context, denying that the IGA has normative force – even in positive law – is like visiting Alice in Wonderland.

In this regard, Canadian positive law rests on an untenable binary alternative: agreements are formally given the force of law through incorporation, or they are devoid of legal force. The reality – including the reality which looms just under the surface of substantial case law – denies this black and white approach, in which 99% of IGAs would amount to mere statements of policy, with no binding force *erga omnes*. The source of legal rules can only be unilateral, yet they are often so intertwined and dependent on IGAs, that Courts themselves decline to unravel them. The exception is when they have to rule on their jurisdiction, which requires a degree of certain clarification.¹⁴⁴ This issue may present the widest rift between theory and practice concerning the legal status of IGAs, and would certainly justify greater academic scrutiny.¹⁴⁵

5.4 The legal effect of IGAs which do not constitute norms *erga omnes*

At the end of Chapter 4, a number of legal doctrines were considered, that could potentially give some legal effect to IGAs that do not cross the threshold of juridicity *inter partes*. A similar enquiry is warranted regarding the status of IGAs *erga omnes*. In fact, these doctrines may be even more relevant to third parties affected by IGAs which clearly govern the behaviour of public authorities, and yet fail to meet criteria to be formally characterised as normative instruments *erga omnes*. While governments can always resort to political strategies to bring another one to reconsider its decision to depart from an IGA,¹⁴⁶ third parties cannot – by definition – seek the renegotiation of an agreement to which they are not party.¹⁴⁷ These doctrines could therefore be particularly significant in Canada, given that so few IGAs are subject to the only undeniable method for giving them force of law, that is, statutory incorporation. Given the uncertainty relating to the possibility of re-characterising IGAs as regulatory instruments, alternative legal safeguards may be useful.

¹⁴⁴ With the exception of federal agent acting for provinces whose actions can be challenged before provincial Superior Court. Even this, however, gives rise to judicial controversies: *Secunda case*, par. 25.

¹⁴⁵ This would likely require detailed case studies of specific cooperative schemes, which the survey of a large number of IGAs undertaken in the present thesis did not allow.

¹⁴⁶ Obviously, with varying degrees of success, depending on power relations and bargaining chips.

¹⁴⁷ Note that the NFCA rejected the argument that governments were estopped from amending the NF Terms of Entry without negotiating with certain groups whose rights were being affected. This, of course, does not relate to a non-legally binding IGA, but to a constitutionalised one. It is mentioned, however, in order to illustrate how private law doctrines are adapted and argued in the context of IGAs: *Hogan*, 261-262.

The purpose of the present section is to point out that while the characterization of an IGA as a legal instrument is likely the most effective way of guaranteeing legal protection to third parties, the lack of such characterization does not oust legal solutions altogether. Again, the scope of this thesis does not allow for a detailed consideration of every ground of judicial review that could potentially be invoked in each federation. I will focus on the corresponding doctrines of legitimate expectations in Canada and the principle of “good administration” in Belgium.¹⁴⁸

Whether the dispute is *inter partes*, or involves an aggrieved third party, the basic idea is the same: these doctrines provide that it is reasonable to expect governments to keep to their word, even when this word is contained in instruments devoid of legal character. Just as public authorities may be forced to comply with a departmental circular, they could, I would argue, be forced to abide by the terms of an IGA which has created legitimate expectations in a third party. This could typically arise with regards to IGAs having “mere administrative” value.

In the Belgian context, let us imagine a business that invested in a particular site, knowing that the surroundings were to be restored pursuant to the 1993 federal-regional agreement on Brussels. While largely publicised (this is a politically visible arrangement), neither the 1993 original nor its 8 addenda have been submitted to legislatures. Let us then imagine that the announced restoration project is abandoned. Could the business launch an administrative law action to have that decision annulled, even if the 1993 agreement does not constitute a legal norm, *per se*, on grounds that its revocation violates the principle of “*bonne administration*”?

Similarly, it is arguable that a Canadian egg producer who made business decisions on the basis of quotas established through officially non-binding IGAs, has a legitimate expectation that its provincial government would not arbitrarily detract from this system. S/he could potentially challenge a decision that departs from it.¹⁴⁹

The corresponding administrative law doctrines of legitimate expectations and “*bonne administration*” could grant some legal protection to third parties who relied on IGAs that never cross the threshold into the domain of binding public law norms. Again, the nature of

¹⁴⁸ Authorities cited in Section 4.4 are largely applicable in the present context as well. See notably ERGEC (1998).

¹⁴⁹ This could be supported by the assertion by McLaughlin J., diss. in *Finlay* (1993), 1117, who concluded that a Manitoba policy of recuperating overpayments from social assistance beneficiaries, violated its own legislation and the Canada Assistance Plan (which was authorised, but neither approved nor incorporated, and could not, therefore, have statutory force. This suggests that the legal foundation for the consistency envisaged could not be the legal character, *erga omnes*, of the

the remedies that could be granted would depend on the circumstances, and clearly on the specifics of each administrative law system. Whether, to put it in common law terms, the “substance” of the IGA could be guaranteed is unclear.¹⁵⁰ At a minimum, however, the doctrines would impose on governments an obligation to provide a reasonable explanation for their departure from an IGA, even if the latter remained on the “purely” political side of the threshold and did not constitute a formal legal source.¹⁵¹

Conclusions

Setting aside the particular phenomenon of Canadian constitutionalised agreements, which has no direct equivalent in Belgium, the fundamental rule in both federations is that executives may not legislate by contract. In other words, the characterization of IGAs as contractual instruments *inter partes*, does not entail a modification of the parties’ respective legal orders, unless the legislative branch is involved. The major difference between the two federations lies in the nature and frequency of this parliamentary involvement.

Officially, in Canada, IGAs will only create rights and obligations for third parties if they are not merely “approved” or “ratified” by statutes, but actually incorporated, that is, given explicit force of law. This rarely occurs, with the result that a very large proportion of IGAs are technically devoid of legal force *erga omnes*.¹⁵² This is consistent with the classic dual character of the Canadian federal architecture, in which each order is endowed with autonomous legislative, executive and to a lesser extent judicial branches of government. In this vision, law of general application is necessarily of a unilateral character. The practice of IGAs vividly illustrates the inadequacy of this theory to account for the interlocking practice of federalism in Canada. Not only is this practice largely situated on the margins on the formal legal system, but even when confronted with non-incorporated IGAs, courts waver between a strict adherence to the dual vision – which considers that the only sources of law of general application must be unilateral – and deference to cooperative schemes, in which the same cannot be asserted with as much certainty.

The situation is apparently clearer in Belgium, given the explicit quasi-constitutional requirement that agreements which “bind Belgians individually” require legislative assent.¹⁵³ Nearly two-thirds of cooperation agreements are submitted to legislative assemblies. The

agreement. In the case, she would only have granted a declaration to that effect (without specifying grounds other than the “violation”).

¹⁵⁰ In Canada, it is almost certainly not possible, given the Supreme Court’s rejection of the substantive branch of the doctrine: *supra*, 4.4.

¹⁵¹ BLÉRO (1998) 107-108; see also cases cited *supra*, 4.4.

¹⁵² Without any record, and the variety of manners in which IGAs can be incorporated, this proportion is difficult to assess with precision. But I would guess between well over 90%.

¹⁵³ S.92*bis*, 1980 DMA.

discrepancy between the practice (which undeniably affects third parties) and the theory (that they cannot be bound save through legislative action) is thus less significant in Belgium than in Canada. This nevertheless leaves open the characterisation of those IGAs which do not receive legislative assent.

Some constitutionalists assert that they have, at a minimum, regulatory value. In my view, in the absence of a formal method for conferring regulatory status to IGAs (equivalent to legislative assent), this wholesale characterization is exaggerated. IGAs that do not require legislative assent may have the legal force of regulations, but only if they meet administrative law criteria relating to “regulatory instruments”, notably functional considerations (what do IGAs actually do? Are they considered obligatory by public officials? Are they susceptible to govern an indefinite number of situations?). Some IGAs pass the test, others would not. Such a recharacterisation would enable third parties to invoke “regulatory” IGAs as legal sources of rights (even though they could not be a source of obligations) before any court of law.¹⁵⁴ Moreover, “regulatory” IGAs could serve as a benchmark to assess the legality of administrative action taken in pursuance or in contradiction of such agreements.

In Belgium, s.92*bis* enables executives of different orders of government to agree on a common text and then simply to submit it to their respective assemblies. Theoretically, a similar result could obtain in Canada if the legislature of every party to an IGA were to incorporate it as is. What is striking is how rarely this is done. A functional equivalent of joint norm-making in Canada lies in the delegation of regulatory power to a joint body, or a body created by another order of government.¹⁵⁵ IGAs constitute essential links between legislation and regulations, in what is often an incredibly maze of legal sources. In this regard, the Canadian situation is exactly the one which Belgian sought to avoid with the adoption of s.92*bis* in 1988-89. While Belgian constitutional law is often convoluted, in this case, the Canadian situation is far less transparent.

Pondering the fate of Belgian agreements which do not receive legislative assent, spurred a reflection on the regulatory function of Canadian IGAs, both as indispensable elements of complex interlocking intergovernmental schemes, in which they articulate unilateral legal sources, and also when they clearly regulate the behaviour of public officials, without formally qualifying as legal sources. While this question remains exploratory, it is worth reflecting on the potential for the recasting of some IGAs as legal instruments, in the same way as courts have recast internal directives as normative instruments. While

¹⁵⁴ S.92*bis*, only conditions the “binding” of individuals on legislative assent.

¹⁵⁵ *Supra*, 1.2.4.4.

Canadian courts have suggested that IGAs may not be a source of rights for third parties¹⁵⁶ (an issue still open in Belgium), such recharacterisation could at least facilitate judicial review of administrative action that counters or implements IGAs.¹⁵⁷

In the absence of such recharacterisation, the legal system of both federations can still potentially offer some legal protection to third parties who rely on agreements between federal partners. Those include legitimate expectations and the principle of “*bonne administration*” which, at a minimum, require governments to justify their departure from public representation or constant practice. This way, IGAs which are officially devoid of legal character *erga omnes*, can nevertheless have some legal effect.

¹⁵⁶ *The Colour of Margarine case: supra*, 5.2.2.3 and 5.3.2.

¹⁵⁷ It bears pointing out, however, that re-characterisation of IGAs as regulatory instruments in either Belgium or Canada could raise problems of validity, if proper procedures are not followed. In other words, such IGAs could cross the border into the sphere of legal instruments, but lack validity in positive law. Of concerns are submissions to the legislative section of the Council of State in Belgium, or to parliamentary committee overseeing regulatory instruments in Canada. Note that the validity of regulatory instruments does not actually depend on publication, although third parties cannot be bound unless they are published. This is not relevant here, since by law, third parties could never be bound by such instruments.

CHAPTER 6: THE PLACE OF IGAS IN THE HIERARCHY OF NORMS

Introduction

Classical public law theory rests on the paradigm of a hierarchy between constitutional, statutory and regulatory norms. The concept of hierarchy of norms ensures that subordinate rules are consistent with other types of rules of a “superior” kind, e.g. that legislation is consistent with the constitution. It consequently also determines which rule can “trump” another. The expression “hierarchy of norms” is not commonly used in common law systems.¹ Nevertheless, the process of determination of the constitutionality of statutory and regulatory instruments, as well as the judicial review of administrative action relies on a conception of law as a hierarchical system.

The present chapter discusses the position IGAs occupy in the hierarchy of norms in positive law. The issue of the hierarchy of norms is obviously very closely related to the question of the status of agreements *inter partes* and *erga omnes*. It is not co-extensive with these questions however, since an agreement can be legally binding, but still be subject to implicit or explicit modification or annulment by a norm located at a “superior” echelon in the hierarchy.

The place occupied by cooperation agreements in the hierarchy of norms is unsettled in Belgian positive law. Some authors underline the difficulty, yet decline to offer a solution.² Others have sought to fill the lacunae through analogies with the relationship between the domestic and the international legal orders. This is addressed in section 6.1. By contrast, in Canada, courts have made quite definite pronouncement regarding conflicts between IGAs and contrary unilateral instruments. While not explicitly framed in these terms, the resolution of such disputes rests on a hierarchical conception of norms of public law. The principle of parliamentary sovereignty has received an extensive interpretation, even in the context of inter-federal cooperation, so as to underline and emphasise the superiority of unilateral legislative norms over IGAs. In this respect Canadian courts have also invoked parallels with the relationship that exists between the domestic and the international legal order under Canadian law. The Canadian position is examined in section 6.2.

This chapter will involve incursions into the separation of powers between the executive and the legislative branches of government as well as the intersection between domestic and international law. Other types of arguments have also been invoked in both countries to

¹ Québec authors are more likely to use it: GARANT (1996) 365 ff.

² MORENHOUT (2001) 617; SCHOLSEM (1991) 282.

attempt to consolidate agreements in the face of competing norms of public law – with various degrees of success. While, once more, the vocabulary and the angle of approach differ at first sight, the Belgian doctrines of “parallelism of forms” and “federal loyalty” find echoes in the invocation of “legitimate expectations” and “unwritten principles of constitutional law” or “constitutional conventions” in Canada. They are all grounded on the belief that federal partners should – in principle and as a matter of good faith – keep their word. Those various doctrines are explored in section 6.3.

6.1 Cooperation agreements and the hierarchy of norms in Belgium

In a succinct way which summarises doctrinal thinking on the issue, CRAENEN notes that cooperation agreements

“[...] are not made unilaterally and therefore cannot be amended or abolished unilaterally by a government or a legislator. The agreements must respect the formal and the material Constitution, but it is not yet clear how they fit into the hierarchy of legal norms.”³

Indeed, neither the Constitution nor the quasi-constitutional legislation which creates cooperative agreements, nor the ordinary legislation which organises the cooperative tribunals meant to enforce them, indicate what their legal status is, or where they fit in the Belgian legal order. Again, the “inventors” of this institution chose – or were forced - to maintain a certain ambiguity concerning the status of these agreements and their relationship with other norms of public law.

In 1988, when cooperative agreements were formally introduced in the Belgian legal order, the Minister responsible for institutional reforms mysteriously declared that “the absence of a hierarchy of norms” would be respected. More precisely, he stated that:

“It is true that the government’s intention is to make the conclusion of certain agreements obligatory, but only in a very limited number of cases, when this appears absolutely necessary and without calling into question the general principle of autonomy and the absence of a hierarchy of norms”.⁴

The very suggestion that there is a “principle” of an “absence of hierarchy of norms” is extremely odd, since the entire Belgian public law system is based on a hierarchy between constitutional norms, statutes, regulatory instruments and administrative acts and decisions.

³ CRAENEN (1996) 38.

⁴ Senate, SE 1988, 405/2, 48 (Formal motivation for legislation: “*Exposé des motifs*”), my translation.

To complicate things further, the government's formal motivation for the proposed introduction of cooperative agreements into the 1980 DMA in 1988-89 provided that agreements would be subject to "ordinary judicial controls".⁵ Judicial review requires – at a minimum – that the judge be in a position to determine the legal force of a particular instrument and its relation to the benchmark norm against which it is being reviewed. The absence of consensus on the precise legal status of the new institution, "invented" in the context of constitutional reforms, thus gave rise to two contradictory statements: that the agreements would not be subject to a hierarchy of norms and that they would be subject to regular judicial review.

It appears that some of the key negotiators rejected the possibility that these agreements could take precedence over the law of each of the signatories, as is the case in Switzerland, for instance. Similarly, concerns were expressed regarding the potential transposition of the superiority of international law over domestic law to the sphere of inter-federal relations. Others took for granted that the new agreements would have greater value than the political agreements which members of the "pre-federal" state could conclude until then, and that this implied not only some legal character but protection against unilateral repudiation through ordinary regulatory or statutory instruments of one party. Parliamentary documents contain references to all these hypotheses.⁶ As is often the case, a "Belgian compromise" was reached, and a solution was designed, veiled in ambiguity but with the potential of temporarily satisfying everyone. The result is indeed profoundly ambiguous. A new legal norm is introduced, but serious doubts remain concerning its relationship with other norms of public law.

This denial that IGAs would be subject to a hierarchy of norms has been reiterated – and criticised – over the last 15 years. It has been observed that this position was untenable from a legal perspective.⁷ If cooperation agreements are legally binding, positive law requires that they be positioned in relation to other norms of public law. In fact, it is possible to interpret the Minister's statement concerning the absence of a hierarchy of norms in a radically different manner from the one offered so far by Belgian constitutionalists.

Reading the statement in context, it appears that the federal Minister was responding to fears that agreements would be used by the federal government to impose rules upon the constitutive units, at the same time as constitutional powers were officially transferred to them. To give just one example of the kind of statements which generated such apprehensions in the early days of the federalisation process, the Report of the Parliamentary Commission charged

⁵ "Sanctions juridiques normales": *Exposé des motifs relatif à l'art. 61 de la loi spéciale du 16.01.1989, introduisant les par. 5 et 6 de l'article 92bis*, Doc Parl, Ch, SO 1988-89, 635/1, 48.

⁶ Doc Parl, Ch, SO 1988-89, 635.

⁷ Le HARDY DE BEAULIEU (1990) 123, 130; COENRAETS and UYTENDAELE (1991) 10-12; KLEIN (1990) 23-24.

with evaluating the 1988-89 reform noted that “in case of violation of an agreement, it would be logical for the central authorities to act as an arbitrator, as is the case in all federal regimes [sic]: *a hierarchy of norms is inevitable*.”⁸ In other words, given the invention of “compulsory agreements”, autonomists were wary of the risk that what was given by one hand by federal negotiators would be taken by the other through the inclusion of compulsory agreements in the 1980 DMA.

Read in this light, the Minister’s words, reproduced above, take another meaning. He was not denying that cooperation agreements, as legal norms, would stand outside the hierarchy of norms – which he denied existed in the first place. He was stating that there would not be any hierarchy between federal and federated entities’ normative instruments. This is in contrast to the situation in Germany or Switzerland, where federal law “trumps” the law of federated entities.⁹ At a time when the foundations of the Belgian federal system were being consolidated, it is highly likely that it was this kind of hierarchy the Minister was rejecting, and not the classic hierarchy of norms between various types of legal instruments. Indeed, in Belgium, the law of federal and federated orders of government are on a par, and neither has primacy over the other. In that sense, a commitment that agreements would not violate the principle of the *absence* of a hierarchy of norms would only mean that they would not be used as instruments of re-centralisation and of restriction of the autonomy of Communities and Regions.

From the perspective of positive law, nothing precludes the possibility that agreements be located in a hierarchy of norms. On the contrary: if they are legal instruments, this is essential. The challenge is simply that the 1980 DMA is silent on the subject and that the parliamentary debates are inconclusive. This surely reflects the lack of consensus on the question and the essentially political character of the debate. It is also partly due to the speed at which constitutional negotiations can take place in Belgium. Moreover, as the experience of other federal systems demonstrate, this question is one of the most taxing in the legal analysis of intergovernmental agreements.¹⁰

⁸ Doc Parl, Ch 1988-89, *Report*, 635/17, 131. My emphasis.

⁹ Of course, it must be recalled that in these regimes of federalism of participation, federated entities participate in the elaboration of federal law through the Second Chamber (directly in the case of Germany, in a less direct manner in the case of Switzerland). Federated entities do not play a similar role in Belgium (at least until further reforms) or in Canada; *supra*: General Introduction.

¹⁰ If the response is relatively clear in federations founded on the English conception of parliamentary sovereignty (on Canada: *infra*, 6.2.2.2), the issue of the place of intergovernmental agreements in the hierarchy of norms raises complex doctrinal debates in Spain or even Switzerland. In the latter case, intercantonal agreements have precedence over the unilateral law of cantons, while federal law would take precedence over them. The fate of federal-cantonal agreements (a relatively recent phenomenon) is unresolved: see POIRIER, *Report*, 66.

6.1.1 Cooperation agreements and constitutional norms

6.1.1.1 Cooperation agreements, the Constitution and constitutional statutes

As discussed in the first Part of this thesis, cooperation agreements play a number of para-constitutional functions in Belgium, as they do in other federal regimes.¹¹ From the perspective of positive law, however, federal partners cannot resort to agreements to alter the formal distribution of powers. While the subordination of cooperation to the Constitution *per se* is hardly questionable, it was not so obvious that the rules concerning the formal distribution of competences, essentially contained in the 1980 Double Majority Act, would take precedence over agreements concluded pursuant to a provision of that same Act, that is, section 92*bis*. This question was settled early on and the subordination of agreements to the distribution of competences is now well established, at least in theory. Consequently, the components of the federation may not – through essentially contractual means – officially transfer, trade, cede or accept competences that are set by the Constitution or the 1980 DMA.¹²

The legislative section of the Council of State (CSLS) takes the most orthodox position in its analysis of the conformity of cooperation agreements to the formal distribution of powers. It will be recalled that the CSLS gives non-binding opinions regarding every proposed statutory instruments, whether they emanate from federal or federated authorities. In the context of cooperative agreements, a ruling by the CSLS can send the parties back to the drafting board.¹³ Parties do not, however, always follow this advice.

To take an example discussed earlier, the CSLS condemned the agreement concluded between the Walloon Region and the French Community to finance the purchase of computers for schools, located in the former, which were under the constitutional responsibility of the latter.¹⁴ It held the agreement – which in the Canadian context would be a typical instrument of the spending power - unconstitutional because it allowed a regional intrusion into the sphere of Community competences. In response, the parties simply altered the title of the agreement, and proceeded to adopt it anyhow.¹⁵ How the Court of Arbitration would handle an *a posteriori* constitutional challenge to the arrangement is open to

¹¹ *Supra*, Chapter 3.

¹² CSLS 26.248-1: Doc Parl CCF 95 (1999-2000)/1, 28.06.2000; CA 94/17.

¹³ This occurred in the context of the 2001 institutional reforms, with regards to the proposed cooperative agreements negotiated alongside amendments to the 1989 DMA on the financing of Regions and Communities: POIRIER, *Lambermont*, 101-103.

¹⁴ CSLS 30.037-2, Doc Parl, CCF, SO, 1999/2000, no. 95-1 (28.06. 2000) 17; *supra*: 3.2.1.1.

¹⁵ Another recent example of an agreement concluded despite harsh criticism by the CSLS introduced the possibility for Regions to finance railways, an exclusive federal matter: CSLS 32.367, Doc Parl VI R (2001-2002) 269, no.1, 30.10.2001.

speculation.¹⁶ Judges called upon to assess the constitutionality of cooperative schemes already established show greater deference than does the CSLS, acting in its preventive and advisory function.

Normally, the administrative section of the Council of State (CSAS) has jurisdiction over the *a posteriori* control of constitutionality and legality of regulations and other administrative acts. Whether this power extends to bi/multilateral instruments, including cooperation agreements which have not received legislative assent, is uncertain.¹⁷

By contrast, the jurisdiction of the Court of Arbitration to control the constitutionality of agreements requiring legislative assent is clearly established. Technically it only has jurisdiction over the norm of assent – as does the CSLS in its preventive action - although they have both held that a “rational” exercise of their jurisdiction required that they analyse the agreement itself.¹⁸ So far, the Court of Arbitration has never annulled a legislative instrument giving assent to a cooperation agreement for violating constitutional or quasi-constitutional norms. In its attempt to avoid this result, it has continued to show a great deal of creativity.

The seminal judgement of the Court of Arbitration on the subordination of cooperation agreements to the distribution of competences on an exclusive basis was rendered in 1994.¹⁹ The French Community and the Walloon Region jointly set up an organ with legal personality (*L'Établissement*) through a cooperation agreement that received the required legislative assents. This organ was granted a number of missions, notably that of overseeing decisions made by social services centres which were then under the exclusive jurisdiction of the Community. An employee of one of those centres was dismissed. *L'Établissement* overturned the dismissal. The social service centre initiated a judicial review challenge against that decision before the administrative section of the Council of State (CSAS). It argued, notably, that this Community-Regional organ exercised exclusive competences of the French Community in violation of the exclusive distribution of powers. The CSAD addressed a “*question préjudicielle*” to the Court of Arbitration on the constitutionality of legislative instruments giving assent to the cooperation agreement.

¹⁶ It is unclear who could have demonstrated a sufficient interest to challenge this legislative instrument (a school from the French Community in Brussels, which did not benefit from the deal restricted to Walloon schools?).

¹⁷ COENRATS defends this position (1992) 177. D'HOOGHE (1996) 116 disagrees. LEROY is silent on the issue. In the “travaux parlementaires”, the government stated that the Council of State would - alongside the Court of Arbitration - be able to annul agreements violating the distribution of powers “Exposé des motifs”, 16.01.1989 DMA, s. 61, Doc Parl, Ch, S0, 1988-89, 635/1, 48. As we saw in earlier (5.3.1), the CSAS has never directly addressed the question of its jurisdiction over cooperation agreements, although a limited number of judicial review cases involve such agreements. The CSAS has not yet been seized of an *a posteriori* challenge to the constitutionality of an agreement.

¹⁸ CA17/94. The CSAS had previously reasoned in similar terms: Doc Parl CWR, 1989-90, 126.

The Court held that the legislative instruments were constitutional, on the basis that *l'Établissement* only made individual administrative decisions, leaving the general normative power exclusively to the French Community. It also accepted the argument that the Walloon Region was indirectly affected by decisions concerning public law centres, because the municipalities that finance public assistance centres fall under the constitutional responsibility of Regions.²⁰ In other words, with this cooperation agreement, the Walloon Region was not trespassing on Community competences. *L'Établissement's* decision to annul the dismissal could therefore be maintained.

The Court showed similar ingenuity in its interpretation of the agreement concerning the monitoring and counseling of sexual offenders's discussed in Chapter 3.²¹ When the CSAS annulled the designation of organisations by the federal Minister of Justice, the agreements had not yet received legislative assent. Once this was obtained, only the Court of Arbitration could have jurisdiction (since statutes were involved). The affected association turned to the Court to challenge the constitutionality of the agreements. It notably contended that the federal government had abdicated its exclusive competence over criminal law, and more specifically, sentencing and parole, by subjecting the designation of organisations involved in the monitoring of offenders to a cooperative scheme.²²

The Court of Arbitration reiterated its classic position that IGAs are subject to constitutional and quasi-constitutional norms. It then also ruled that - exceptionally - the appendix did not form part of the agreement, and had therefore not received legislative assent. This deprived the Court of jurisdiction, which, as we saw, requires that some legislative instrument be involved. In other words, by excluding the appendix, the Court did not have to rule on the constitutionality of an agreement that was potentially problematic. While the Council of State had found an ingenious way of controlling the legality of the Minister's decision by characterising it as a unilateral act, the Court of Arbitration used similar reasoning to avoid ruling on the constitutionality of the designation.²³ In so doing, the Court paid lip service to the formal hierarchy of norms, but was very sensitive to the cooperative scheme elaborated by federal partners, who had been subject to strong criticism for their lack of cohesion and coherence in the context of the Dutroux scandal.²⁴

¹⁹ CA17/94, on a prejudicial question from the CS, no. 42.238, 10.3.1993 (*L'Établissement*).

²⁰ At the time, municipalities were under the administrative control of Regions. Since 2001, the whole normative apparatus regarding municipalities has been regionalised.

²¹ CA101/2001 (31.07.2001) (CRASC).

²² In Canada, this could have been framed as a fettering of executive action issue: *supra*: 4.1.2.2.

²³ The case also dealt with the complex distribution of competences between the Walloon Region and the French Community in this matter, following the 1994 transfer. This is irrelevant for the present purposes.

²⁴ This refers to a political crisis following the capture of a famous paedophile. The case illustrated notably the lack of communication between various police forces and political authorities: "Enquête

Technically, the Court does not have jurisdiction over the agreement itself and could therefore not invalidate it, were it to find it unconstitutional.²⁵ In practice, invalidating the instrument that gives it legal effect would reach the same result. LEURQUIN-de VISSHER suggests that in such a situation, the agreement would “survive” in the legal order, but would be deprived of legal effect.²⁶ The actual meaning of this very formalistic solution is unclear. Possibly, it would imply that the agreement could be “revived” if the annulled legislation approving it were re-enacted. This would make sense if the Court of Arbitration had jurisdiction over issues such as the capacity of parties to conclude agreements, respect for formalities and so on. But the Court does not have this jurisdiction. If the Court of Arbitration were to annul an Act approving an agreement on the grounds that the agreement violates the distribution of powers, or fundamental rights, it is difficult to imagine how the agreements could “survive in the legal order”.

To summarise, the Court of Arbitration grants significant latitude to federal partners to organise their affairs through cooperation agreements. It will not rule them unconstitutional to the extent that parties can demonstrate some connection with their respective competences, even if, in reality, the matter only relates to the competences of one of them (*L'Établissement*). It has also downplayed the cooperative nature of a ministerial act annexed to a cooperation agreement, when this also protected the agreement from severe judicial scrutiny (*CRASC*). Due respect is officially shown to the hierarchy of norms, but imaginative interpretations ensures that this hierarchy is no hindrance to intergovernmental arrangements.

6.1.1.2 Cooperation agreements and the “constitutions” of federated units

Belgian federated entities – with the notable exception of the Brussels Region – have explicitly been granted what is generally described as “constitutive” or “organic” autonomy.²⁷ This implies that within limited parameters they are entitled to structure their public institutions. They essentially must do so through the adoption of statutes adopted by special majorities, but under the authority of a federal DMA. Assuming that these organic statutes (relative to the composition of legislative assemblies, or executives, for instance) could be called Constitutions, they would be “subordinated” to the federal Constitution, and to federal

parlementaire sur la manière dont l'enquête, sans ses volets policiers et judiciaires, a été menée dans “l'affaire Dutroux-Nihoul et consorts”, Doc Parl, Ch, SO 1996-1997, 713.

²⁵ Early on, some argued for an extended jurisdiction of the Court of Arbitration, so that it could annul the agreement as well: amendments rejected: Doc Parl, Ch SO 1988-89, 635/15; COENRATS (1992) 176, ALEN and PEETERS (1989) 369; de WILDE (1990) 113.

²⁶ LEURQUIN-DE VISSCHER (1994) 222.

²⁷ DELPÉRÉE (2000) 564-567; UYTENDAELE (2001) 714-728.

DMA²⁸. For the time-being, federated entities could adopt rules concerning cooperation agreements that would differ from those contained in s.92*bis*. In other words, a federated entity could not decide – at this stage, anyhow – that every cooperation agreement to which it is party must henceforth be approved by the assembly. Hence both a federated “Constitution” and cooperation agreements are placed below federal DMA²⁸ in the hierarchy of norms.

This does not resolve an eventual conflict between such a “Constitution” and a particular cooperation agreement. This issue has not been addressed in the literature. To the extent that “constitutive” autonomy is essentially limited to issues of composition of institutions, it seems obvious that such rules would apply to cooperation agreements. In other words, an agreement could not derogate from those organic rules.²⁹ Cooperation agreements are thus located below the “Constitutions” of federated entities.

6.1.2 Cooperation agreements and ordinary statutory instruments

So far no court has had to rule on a contradiction between a cooperation agreement and a regular statute. While in theory – if not in practice – the hierarchy between constitutional norms and agreements is not controversial, the respective place of agreements and legislative instruments is more problematic.

The hypothesis is the following: an agreement receives the legislative assent of every party. Some time later, under the likely impetus of the executive that controls it, one of these assemblies chooses to revoke its assent or to legislate in a manner which clearly contradicts the content of the agreement. What can prevent the assembly from so acting? As we shall see, this scenario, which analysts, civil servants and politicians in Belgium consider untenable, occurred in Canada, where by contrast, the courts have confirmed the legislation’s pre-eminence over IGAs.³⁰

To my knowledge, no Belgian constitutionalist explicitly posits that statutes take precedence over IGAs. Those who doubt, simply assert that the issue has not been resolved.³¹ Several constitutionalists maintain, however, that the “logic” of the system requires that agreements be placed above statutes in the hierarchy of norms, so as to protect

²⁸ A Flemish Constitution was drafted – as an academic exercise – a few years ago, but never adopted: BRASSINE, Jacques, “La Constitution flamande: essai de constitution pour la Flandres”, CRISP no. 1569-70, Brussels, 1997. The vast majority of institutional issues are governed by DMA, and that the degree of “constitutive” autonomy in this regard is limited.

²⁹ Such a possibility is, in any event, highly remote.

³⁰ *Infra*, 6.2.2.2.

³¹ SCHOLSEM (1991) 282; MOERENHOUT (2001) 617, citing ALLEN, André, *Compendium van het Belgisch Staatsrecht*, T.I (Diegem: Kluwer, 2000) 329.

them from unilateral modification or denunciation.³² As the quotation by CRAENEN reproduced at the beginning of this section illustrates, Belgian analysts often simply assert that cooperative agreements are consensual and thus cannot be revoked unilaterally, including by a legislative assembly. This is asserted as self-evident, as is in a way which is reminiscent of the presumption that all cooperation agreements are necessarily legally binding.³³

Hence, writing soon after the formal introduction of cooperative agreements in 1989, HARDY de BEAULIEU observed that to grant cooperative agreements legal status inferior to (ordinary) legislation would render them vulnerable to unilateral modification or repudiation by the legislative assembly of one of the parties.³⁴ Placing agreements on a par with statutory instruments would have a similar destabilising effect. They would then amount to political agreements, and as such, would be, in his view, of limited interest. This line of reasoning finds echoes in current writing on the subject.³⁵

Three distinct lines of argument can be distinguished in support of this position. The first consists in an analogy with the hierarchy that exists in Belgian law between international treaties and domestic law. It is addressed in the rest of this section. Arguments based on the administrative law doctrine of the “parallelism of forms” and on the constitutional doctrine of “federal loyalty”, are examined in the third part of this chapter, alongside comparable Canadian doctrines, also invoked as an attempt to protect IGAs from unilateral contrary action, and thus to locate IGAs as high as possible in the hierarchy of norms.

6.1.2.1 An analogy with the intersection between the domestic and the international legal orders: a principally monist conception regarding cooperation agreements

The parallel between the dominant conception of the hierarchy that exists between cooperative agreements and statutory instruments and the dominant conception of the hierarchy between directly applicable norms of public international law and domestic legislation is striking. Monist with regards to customary international law, the Belgian legal system is a hybrid with regards to the relationship between domestic law and international treaties.³⁶ Treaties will only have effect in the domestic legal order to the extent that they

³² COENRAETS (1992) 162-167; CRAENEN, (1996) 38; UYTENDAELE (2001) 868-873.

³³ A presumption which I argued was rebuttable: *supra*, Chapter 5.

³⁴ Le HARDY (1990) 126-131.

³⁵ UYTENDAELE (2001) 870-873.

³⁶ On monism and dualism, see DAILLET and PELLET (2002) 92-97; BROWNLIE, Ian, *Principles of Public International Law*, 5th ed., (Oxford: Oxford UP, 1998) 31-57. Some have argued that the priority given to international law lies in a principle of domestic constitutional law. Consequently, in the domestic legal order, the Belgian Constitution would take precedence over public international law. As

have received the assent of the proper legislative assembly.³⁷ It bears pointing out that this primacy of treaties over domestic law, once they have received proper assent, only applies to agreements which contain sufficiently particularised undertakings, and are therefore “directly applicable” or “self-executing”.³⁸ In other words, a treaty which invites parties to alter their legal order, but does not itself give rise to concrete rights or obligations, would not take precedence over the domestic legal order.

These two caveats bring Belgium much closer to a dualist regime than Belgian internationalists and constitutionalists appear willing to admit. This being said, some notable differences with the “pure” dualist system in place in Canada and the often ambiguous position in Belgium are worth examining, as they seem to have some bearing on the understanding of place which IGAs occupy – or should occupy – in the hierarchy of norms in the two federations.

The hierarchy of norms between cooperative agreements and legislative instruments raises two distinct scenarios: first, the explicit revocation of the Act giving assent to a cooperative agreement; second, the adoption of an Act which explicitly contradicts the content of such agreement. Only the second has been considered in the literature. In light of the situation in Canada, however, the first scenario should also be examined.

6.1.2.2 The revocation of a legislative instrument giving assent to a cooperation agreement

In the course of interviews, I raised the possibility of the legislative revocation of statute giving assent to a cooperative agreement. My Belgian interlocutors were unanimously puzzled or even shocked by it. While such a revocation is highly improbable from a political point of view, no one seemed able to explain why it would be legally inadmissible. Since, as we shall see in the next section, this possibility is undeniable in Canada, I sought to understand why it was so far-fetched in the Belgian context. Given the analogy with public international law which is developed by some analysts with regards to contrary subsequent statutes – and which is examined in the next sub-section – it seemed

mentioned above, the three highest Belgian Courts (Court of Cassation, Court of Arbitration and Conseil d'État) are divided on the issue: JAMART (1999) 131 and cases cited.

³⁷ S.167(2), *Constitution*. Given the correspondence between domestic competences and external competences, the order of government competent for a particular matter will sign and ratify a treaty and its legislative assembly will give assent to it.

³⁸ In the international law literature, the expressions “directly applicable” and “self-executing”, tend to be used interchangeably to refer, ambiguously, to two distinct issues. First, they designate instruments which do not require further implementation on the part of contracting parties (because of the character of their content). Secondly, they refer to the fact that in some countries, treaties which are “self-executing” in that first sense, constitute a source of domestic law without being “transformed” into a domestic source. They can therefore be directly applied by domestic courts: BROWNLIE (1998)

useful to examine the respective roles of the legislative and executive branches of government with regards to international treaties. My thesis here is the following: the limited role of parliaments with regards to international treaties is *implicitly* transposed in the context of cooperative agreements.

In Belgium, an international treaty will only have effect in the domestic legal order once it has received parliamentary assent. Until 1993, the precise parliamentary instrument required for treaties concluded by federal authorities was not specified in the Constitution.³⁹ In practice, however, this assent was always provided by statute. According to the Court of Cassation, the truly normative instrument remains the treaty, not the statute giving assent to it.⁴⁰ In other words, the legislative instrument is essential from a procedural point of view, but the treaty is directly applicable in the legal order, once this procedural hurdle is passed.⁴¹

This hybrid approach distinguishes Belgium from “pure” dualist Anglo-Saxon countries such as Canada, where a treaty must be incorporated into domestic law through an act that has the status of a regular statutory instrument. While the distinction may appear cosmetic, it has consequences in terms of the power of the legislative assembly to change its mind. Indeed, as the section on the hierarchy of norms relative to IGAs in Canada will show, in a British-style parliamentary system, the legislator can always revoke an act, including one that incorporates an international treaty in the domestic legal order. Doing so may place the country in violation of its international obligations, but the subsequent statute would undeniably be valid in the domestic legal order.

In Belgium, a legislative instrument giving assent to a treaty does not constitute an ordinary statutory instrument, even when it takes the form of a statute.⁴² It is considered to be an “*acte de haute tutelle*” through which the legislative branch exercises a degree of control over the executive branch. And here is the key: once this legislative assent is given, the legislature loses its jurisdiction. It may no longer revoke this assent. The assembly could invite the executive to denounce the treaty, through a motion, for instance. But the act of denunciation lies exclusively with the executive. The latter does not even require the consent of the assembly to denounce a treaty that had received parliamentary assent. In other words, while legislative assent is essential for the treaty to have an effect in the

50; VERHOEVEN, Joe, *Droit international public* (Brussels: Larcier, 2000) 451-452. In the present context, I use the expression in the first sense.

³⁹ Except in the case of treaties dealing with the cession of territory which explicitly requires a statute: s.167, *Constitution*. Since 1993, see ss. 75 and 77, *Constitution*.

⁴⁰ SALMON and DAVID (2001) 89 ff. ; Cass. (19.03.1981), *Aff. Pacific Employers Insurance Co. c. Régie des Postes et Pan American Airways*, Pas., I, 779.

⁴¹ This, again, only applies to self-executing instruments.

⁴² “[C]e n’est pas un acte matériellement législatif” VERHOEVEN (2000) 460.

domestic legal order, the legislative branch has limited powers with regards to treaties.⁴³ It can refuse or grant its assent. Once granted, it cannot “undo” what it has done. The legislative instrument that introduces a treaty into the domestic legal order thus has a “ratchet effect”.⁴⁴

Requiring legislative assent makes sense given the executive’s exclusive power to conclude and ratify international agreements, and given the primacy of directly applicable international agreements over domestic law. What is surprising, from the perspective of democratic governance, is the “one-way” nature of this parliamentary control. This, however, is now unanimously admitted in Belgium. While the supremacy of international law over domestic law was subject to intense debate prior to 1971, when the Court of Cassation clearly confirmed it, it is now seen as self-evident.⁴⁵

While the 1971 Court of Cassation’s decision that introduced this primacy dealt with a contradiction between domestic legislation and a European Community regulation, its reasoning was explicitly extended to every type of international norm. The supremacy of international law is derived from the desire to avoid a situation in which Belgium could be found to violate its international obligations by reason of domestic legislation which precludes it from properly implementing a treaty to which it is a party.⁴⁶ Withdrawal of legislative assent to international treaties could also lead to a finding of violation of international obligations at the international level. Fundamentally, this now unquestioned admission that directly applicable international instruments take precedence over domestic law reflects an unquestioned belief that public international law is somehow “intrinsically superior” to domestic law.⁴⁷

This approach finds an echo in the doctrine concerning cooperation agreements. Indeed, the analogy between the role played by legislative assemblies with regards to international treaties and with regards to cooperation agreements would likely carry some weight, were a proposed bill revoking assent to be filed before an assembly. This being said,

⁴³ By contrast, in Canada, the legislative branch does not even need to give its approval for the ratification of a treaty (except in part in Québec: *An Act respecting the Ministère des Relations internationales and other legislative provisions*, RSQ, ch. M-25.1.1, s.2.2). Of course, the refusal by a legislative assembly to incorporate treaty which the executive has ratified would have a similar effect.

⁴⁴ Similarly, legislative instruments endorsing “management contracts” (*contrats de gestion*) with a state corporation are also considered distinct from regular statutes: Cass. 21.12.2000 (2001) Jurisprudence Liège-Mons-Bruxelles 848 (RTBF).

⁴⁵ Cass. 27.05.1971, Pas., I, 887 (*Le Ski*) On positions prior to 1971: MASQUELIN (1980) 410-431.

⁴⁶ Such risk is admitted in dualist system, in which domestic law is interpreted so as to be consistent with a State’s international obligations, as far as possible. In case of a clear contradiction, however, domestic law takes precedence.

⁴⁷ Interestingly, this conviction, which has natural law connotations, is shared by internationalists clearly associated with the positivist school, such as Jean SALMON or Eric DAVID. On the *jusnaturalist* foundation of the *Le Ski* decision: DIEUX (1995) 67-75.

the parallel between the two situations is not perfect. Three arguments could be raised against the transposition of the intersection between the domestic and international legal order and IGAs and the legal orders of parties to them.

First, while legislative assent to treaties may be given prior to the conclusion of that treaty,⁴⁸ the legislative section of the Council of State (CSLS) has held that legislative assent to a cooperation agreement could only be granted after they have been signed by every party, and the final content is therefore known.⁴⁹ In the same opinion, the CSLS stated that a distinct legislative assent is necessary for each agreement implementing a framework agreement, to the extent that it also qualifies as an agreement of a legislative nature. Multiple assents are not necessary in the case of international treaties. For the CSLS this reflects a fundamental difference between the two types of instruments:

“While [assent to a treaty] does not modify the nature of the approved norms, assent [to agreements] has the effect of conferring the force of a statute unto every provision of the agreement. This difference is an obstacle to the transposition of the reasoning regarding assent to treaties, to assent to agreement.”⁵⁰

Finally, pursuant to section 92*bis*, legislative assent is notably required when a cooperation agreement enters the domain reserved to the legislative branch.⁵¹ Through a cooperation agreement, two or more executives can jointly adopt norms that, within their respective legal orders, could only be introduced through legislation. They can do so on condition of obtaining legislative “assent” in the form of a statute. In a way, this statute “ratifies” the exercise of legislative powers by executives. It is certainly arguable that such a delegation should be revocable.

The trouble with this objection is that it could also be raised with regards to international treaties. Since directly applicable international instruments take precedence over domestic law once they have received legislative assent, democratic concerns could

⁴⁸ Cass. 19.03.1981, Pas., I, 779.

⁴⁹ CSLS 24.479, discussed in “Conseil d’État: Rapport public pour l’année judiciaire 1995-1996”, (1999) *Chroniques de droit public* 1-2. It is noteworthy that in the 60s, the CSLS has also held that parliamentary assent could only be granted after the treaty was concluded. This position was not followed by the Court of Cassation in the early 1980, which accepted prior authorisation, to the extent that the treaty did not have the effect of modifying statute law: Cass. 19.03.1981, *Aff. Pacific Employers Insurance Co. V. Régie des postes*, Pas. 1981, I, 779, *JT* 1982, 565, note Verhoeven). There is thus a noteworthy parallel between the approaches developed by the CSLS in the 70s with regards to treaties (but disregarded by the Court of Cassation) and twenty years later with regards to cooperative agreements.

⁵⁰ “Conseil d’État: Rapport public pour l’année judiciaire 1995-1996”, (1999) *Chroniques de droit public* 1-2, fn 2 (re CSLS 24.479).

lead to a conclusion that this assent should not be a “one way street”. Yet, as we saw, such objections are now totally absent from the analysis of the respective places occupied by international law and ordinary statutes in the hierarchy of norms. In fact, in the previous citation, the distinction made by the CSLS between the assent to treaties and to agreements is weak since assent to a treaty does not give it the force of a statute, it actually gives it supra-legislative force. Once assented to, a treaty clearly has supremacy over legislative norms in the domestic legal order and has – as we just saw – a “ratchet effect”.

At this stage, no clear rule of positive law precludes a legislative assembly from revoking its assent to a cooperative agreement. Not only has the situation not arisen yet, the very possibility that it could occur has not even been contemplated by relevant actors. While the analogy with the restrictions imposed on legislative assemblies regarding international treaties is not perfect, it would be forcefully argued to deny legal effect to a statute purporting to revoke an assent previously granted by a legislative assembly. In other words, while the hierarchy of norms between an agreement that has received legislative assent and a subsequent statute withdrawing this assent is not totally free from doubt, it is likely that courts would give priority to the former. Concerns with the stability of intra-state relations would no doubt be equated with concerns for legal stability in the international legal order.

6.1.2.3 The subsequent adoption of legislative instruments contradicting a cooperation agreement

The explicit revocation of an instrument assenting to a cooperation agreement is unlikely to arise in practice. Less improbable would be the adoption of a legislative instrument which either implicitly or explicitly contradicts a cooperative agreement currently in force. To give a concrete example: two Regions conclude an agreement in the field of environment protection. Without expressly withdrawing its assent to this agreement (for political reasons, or because the case law would by then have ruled that this is not legally feasible), one of those Regions subsequently legislates in contradiction with the cooperative agreement.⁵² Which, of the agreement and of the subsequent contrary statutory instrument, should take precedence?

This potential contradiction between a legislative instrument and a cooperation agreement is one of the main concerns of Belgian analysts.⁵³ In this context, they have drawn express parallels between the intersection of the domestic and the international legal orders and

⁵¹ The distinction between legislative and executive domains is a complex one. In theory, a legislative act should set guiding principles, and regulations should implement. In practice, the border between the two is much harder to set: MAST (1989) 28-29.

⁵² This is, in fact, the parallel fact pattern to the *Le Ski* decision of 1971 in which the Court of Cassation confirmed the primacy of public international law over domestic legislation.

⁵³ *Supra*, 4.2.

the intersection between legislative instruments of federal partners and cooperation agreements to which they are party. Such a parallel is not unprecedented. Courts in Switzerland explicitly endorse it.⁵⁴ However, the government did not suggest this form of correspondence when cooperation agreements were introduced in the Belgian legal order in 1988-89. This would have required a clarification of the place of agreements in the hierarchy of norms, which, as we saw, negotiators could not agree upon. Moreover, as we saw, the CSLS warned against this parallel, for reasons, which were not, however, wholly convincing.

So far, the analogy has only been summoned in academic analysis. For instance, MOERENHOUT and SMETS explicitly described cooperation agreements as “domestic treaties”.⁵⁵ Along the same lines, already in 1989, ALEN and PEETERS tentatively suggested that with the adoption of section 92*bis*, the Belgian legal order *may* have gone from a dualist system (with legally permissible revocation and contrary legislation) to a monist system (which would exclude those possibilities).⁵⁶

The analogy entails that a cooperation agreement that has received legislative assent is located at a higher echelon than unilateral legislation of each party to the agreement, whether anterior or subsequent to the agreement. Hence, UYTENDAELE proposes the following hierarchy⁵⁷:

- * [Directly applicable] public international law
- * Constitution
- * Double majority Acts
- * Ordinary statutes of a constitutional nature⁵⁸
- * [Constitution of federated units?]⁵⁹
- * **Cooperation agreements having received legislative assent**

⁵⁴ POIRIER, *Report*, 71. Courts in the USA resort to international law to resolve disputes regarding interstate compacts, while in Germany, the analogy has been rejected, but arguably partly replaced by the significance of the *Bundestreue*: ERGEC (1987) 337-340.

⁵⁵ MOERENHOUT and SMETS (1994) 146. DELPÉREE (2000, 626, fn 8) suggests this analysis may be “somewhat abusive” (“peut-être quelque peu abusive”), without, however, taking a position on the question.

⁵⁶ ALEN and PEETERS (1989) 365.

⁵⁷ UYTENDAELE (2001) 121. In his previous editions (eg. 1997, 981), this author used to distinguish between cooperation agreements that received legislative assent, and those which did not. The former were placed, as here, above ordinary legislation, the latter just below. Now, his position seems to be that even agreements which do not require – and obtain – legislative approval are located above legislative instruments.

⁵⁸ For instance, the Ordinary Act concerning the German-speaking Community. It is unclear why such a constitutional statute did not require a double-majority Act. We can only surmise that at the time it was voted, no one thought it required a clear majority support in each of the two major linguistic groups. In other words, constitutional arrangements involving francophones and Flemish are often conceived as zero-sum games which require the undeniable support of each group. Arrangements concerning the German-speaking Community were not seen, until recently, as particularly problematic from that perspective. This could change, however, with increasing demands by the German-speakers to obtain their own Region as well as their Community.

⁵⁹ These are not considered either in the literature: *supra*, 6.1.1.2.

- * Ordinary federal, regional or Community statutes (“Laws”, “decrees” and “ordinances”)
- * **Cooperative agreements which have not received legislative assent**
- * Regulatory instruments of the federal or the federated orders of government

According to the proposed analogy, just as a directly applicable treaty is located at a higher level in the hierarchy of norms once it has received the proper parliamentary approval, a cooperation agreement similarly approved would be located between constitutional statutes and ordinary legislation. Just as legislative assemblies may not legislate in contradiction with directly applicable norms of public international law, they may not adopt norms that contradict a cooperative agreement.

By analysing cooperative agreements by analogy with international treaties, constitutionalists are seeking a way of giving them a legal stability and protection against unilateral action that the positive law has not explicitly provided. The parallel drawn is intellectually attractive and understandable from a political perspective. However, some counter-arguments could be raised. Three were invoked in the previous sub-section, in connection with the potential differences between the admitted incapacity of legislative assemblies to withdraw their assent to treaties once they have given it, and the role of the same assemblies with regards to cooperation agreements.⁶⁰

More compelling perhaps than those four objections are the restrictions imposed on the Court of Arbitration regarding cooperation agreements. As we saw above, the constitutionality of a legislative instrument giving assent to an agreement (and indirectly of the agreement itself) is subject to review by the Court of Arbitration.⁶¹ The latter has jurisdiction to review the conformity of legislative acts with rules governing the distribution of powers, as well as with a limited number of constitutional rights.⁶² Cooperation agreements are thus “*normes contrôlées*”, that is, their constitutionality is subject to review.

In 1988, the Court of Arbitration was granted the express jurisdiction to control the conformity of legislative instruments with a number of compulsory cooperative mechanisms (consultation, association and so on).⁶³ This power was expressly *excluded* with regard to cooperation agreements. Thus cooperation agreements are not “*normes de contrôle*”: they cannot serve as constitutional benchmarks to assess the constitutionality or the validity of

⁶⁰ *Supra*, 6.1.2.2.

⁶¹ CA94/17.

⁶² Ss. 10, 11, and 24, *Constitution* (equality and education rights); s.1, 1989 DMA on the Court of Arbitration.

⁶³ S.124*bis* 1989 DMA on the CA. A number of rulings have been rendered concerning alleged violations of such compulsory “non-contractual” techniques: MOERENHOUT (2001) 606-607 and cases cited.

legislative instruments.⁶⁴ In other words, even if UYTENDAELE's model were accepted, the Court of Arbitration could not invalidate a statute that contradicts a cooperation agreement. This does not necessarily imply that cooperation agreements are "inferior" to ordinary statutes, since the Court of Arbitration only has limited attributed jurisdiction. It does, however, restrict the practical interest of the hierarchy proposed.

The situation could be different in the case of compulsory agreements, whose conclusion is provided for in a quasi-constitutional statute, the 1980 DMA. Were legislation introduced in contradiction with such a compulsory agreement, SCHAUS argues that the Court of Arbitration could assess its constitutionality, not against the benchmark of the agreement *per se* but against the provision of the DMA concerning the obligation to agree.⁶⁵ This ingenious solution would certainly give a basis for the Court of Arbitration to at least consider the issue, and perhaps make an appeal to "federal loyalty".⁶⁶

The Court has been known to provide an extensive interpretation of its own jurisdiction. For instance, it considered the argument that a federal statute was unconstitutional because it dealt with matters which required a cooperation agreement, pursuant to section 92*bis*.⁶⁷ The Court did not actually annul the statute. Neither did it assess its constitutionality against the benchmark of a cooperation agreement (which did not exist) but against the *absence* of such an agreement. This suggests that the Court could eventually extend its jurisdiction to some extent so as to control – albeit indirectly – the conformity of a legislative instrument with a cooperation agreement of a legislative nature.

Obviously, the DMA on the Court of Arbitration could also be amended to allow explicitly for this control, by treating cooperation agreements as other forms of legislated cooperative measures. But there does not appear to be any political desire expressly to grant this extended jurisdiction to the Court. As it stands, the Court of Arbitration's jurisdiction to annul a statute that violates a cooperation agreement is – at best – uncertain.

The potential contradiction between a legislative instrument giving assent to a cooperation agreement and a regular statute could also arise in the course of an "ordinary" civil or criminal case. An ordinary court may not refuse to apply a legislative instrument.⁶⁸ Assuming no conciliatory interpretation of the two texts can be given, the court would have to give priority to one of the legislative instruments and thus resolve the hierarchy of norms

⁶⁴ Also s.124*bis*, 1989 DMA on the CA: UYTENDAELE (2001) 869.

⁶⁵ SCHAUS (2001), vol. I, 155-157.

⁶⁶ *Infra*: 6.3.1.2.

⁶⁷ CA56/96.

⁶⁸ S.159, *Constitution*.

conundrum.⁶⁹ Would it use regular rules of statutory interpretation (priority to the later instrument or to the more specific instrument, for instance)? Or would it attempt to give priority to the instrument giving assent to the cooperation agreement, through an analogy with the supremacy on international instruments properly assented to, as provided by UYTENDAELE's model?

Sitting in final appeal over the "ordinary courts", the Court of Cassation could then eventually be called upon to resolve the issue of the supremacy between cooperation agreements and unilateral statutes, as it had to do in 1971 with regards to statutes and international treaties. As it stands, the respective places of cooperation agreements that have received legislative assent and regular statutes in the hierarchy of norms remains unresolved in Belgian positive law, despite strong doctrinal calls for giving precedence to the former.

6.1.3 Cooperation agreements not requiring legislative assent and regulations

If the foregoing account of the position of ratified cooperation agreements seemed uncertain, the place occupied by cooperation agreements not submitted to legislative assemblies is not necessarily simpler. Fortunately, three aspects of the question are established. The first relates to cooperation agreements requiring legislative assent but which do not obtain it. They are invalid and have no place in the hierarchy of legal norms.⁷⁰ The second is that agreements that do not require legislative assent must respect constitutional and legislative norms. Hence, ordinary courts could simply ignore a cooperation agreement that contravenes legislative or constitutional provisions as if it did not exist.⁷¹ Third, in the eventuality of a contradiction between a regular (unilateral) regulation and an agreement not requiring legislative assent, the former will clearly take precedence. The hierarchy would then oppose a regulation with an administrative instrument lacking in legal character. This is unless the agreement can be characterised as a regulatory instrument.

In that case, a typical dilemma of hierarchy between two regulatory instruments would arise: a unilateral one and a bi/multilateral one. The hypothesis is the following: a government party to a cooperation agreement which did not require legislative assent adopts a regulation that contradicts the agreement in some way. Alternatively, an agreement is concluded and its content contravenes the content of a regulation already in place in the legal order of one of the parties. These scenarios correspond to the contradiction between an agreement having received legislative assent and a regular statute, examined in the previous sub-section.

⁶⁹ LEURQUIN-DE VISSCHER (1994) 223-224.

⁷⁰ *Supra*, 5.2.1.2.

Such a conflict of norms could surface in the course of an ordinary (civil, criminal or commercial) legal action. An “ordinary” court would then have to choose between traditional rules of interpretation (prior adoption, greater specificity, etc.) and priority to the negotiated instrument over the unilateral one. In UYTENDAELE’s model reproduced above, agreements take precedence over regulations.⁷² For the time being, it is unclear whether this is *de lege ferenda*, or *de lege lata*.

The relative place of agreements not requiring legislative assent and of regulations is further complicated by the remaining doubts concerning the administrative section of the Council of State’s jurisdiction regarding cooperation agreements. As with the Court of Arbitration, the CSAS’s capacity to use cooperation agreements as “norms of control” is partly curbed. In other words, even if we admit that bilateral “regulatory instruments” (if agreements could be so qualified) are situated above regular regulations in the hierarchy of norms, it is unclear that the CSAS whose function is normally to review regulations that contravene “higher norms” (such as legislation and the Constitution) could actually do so.⁷³

6.1.4 Cooperation agreements and administrative decisions

Obviously, the administrative section of the Council of State (CSAS) can annul a unilateral administrative decision or act taken in contradiction with a cooperation agreement that has received legislative assent. This is a simple application of administrative law principles, pursuant to which decisions or acts of the administration must conform to legislative instruments.

However, the CSAS’s jurisdiction to assess the conformity of an administrative decision with a cooperation agreement that has not received legislative assent, is not entirely clear.⁷⁴ On the one hand, the use of cooperation agreements as “*norms of control*” was explicitly restricted, in parallel with the restrictions imposed on the Court of Arbitration regarding norms of assent. Oddly, however, only one ground of judicial review was explicitly excluded in the case of the CSAS, which leaves open the possibility that it could annul administrative action on other grounds.⁷⁵ The case law does not provide a clear response and the literature is surprisingly discreet on the topic.⁷⁶

⁷¹ S.159, *Constitution*, ordinary courts must refuse to apply orders or regulations violating legislative provisions. They cannot annul them, however.

⁷² See the hierarchy proposed in the previous sub-section. It will be recalled that UYTENDAELE seems to assume that all agreements concluded pursuant to section 92*bis* have – at a minimum – the normative force of regulations: *supra*, 5.3.1.

⁷³ We saw that the CSAS has avoided ruling on its own jurisdiction regarding cooperation agreements but has not declined jurisdiction in cases when this could have been justified: *supra*, 5.3.1.

⁷⁴ S.14*bis*, CACS; *supra*: 5.3.1.

⁷⁵ Review is explicitly excluded on grounds of violation of “substantial formality” (which is the ground pursuant to which administrative or regulatory instruments that violate other types of compulsory

A partial solution could be provided by the doctrine of “*divisible acts*” (“*actes détachables*”). This distinguishes between an administrative contract, which is governed by ordinary civil law and can be enforced by ordinary courts, and the decision to contract or the choice of contracting party, which is subject to judicial review by the Council of State.⁷⁷ By analogy, it could be argued that even if the Council of State has no direct jurisdiction regarding bi/multilateral instruments, it can nonetheless review the legality of a unilateral decision to conclude such an agreement, and thus, indirectly, its conformity with legislative or regulatory provisions.⁷⁸

6.1.5 Cooperation agreements as contractual instruments and the hierarchy of norms

As the entire second Part of this thesis has demonstrated, cooperation agreements in Belgium are essentially conceived as a type of norm *erga omnes*, rather than as contractual instruments. The preceding discussion on the place of agreements in the hierarchy of norms rests on this dominant conception: do agreements have legislative, supra-legislative, regulatory or supra-regulatory force? The task is to determine how these original normative instruments mesh with classic types of norms.

As I sought to demonstrate in Chapter 5, however, the contractual dimension of agreements cannot be ignored, even in Belgium. What is the place of IGAs conceived as contractual instruments, as opposed to normative instruments *erga omnes* in the hierarchy of norms? Obviously, IGAs which do not cross the threshold of juridicity as contracts, and are characterised as “purely political” protocols, would not be protected against unilateral contrary action by a party, whether this action takes the form of legislative or regulatory instrument. The situation is, predicably, more complicated in the case of cooperation agreements that do qualify as contractual instruments *inter partes*.

Interestingly, there does not seem to be any example of legislation taken to put an end to a regular government contract.⁷⁹ This could partly be explained by the fact that public

cooperation can be annulled). This leaves the possibility of review on grounds of “*excès de pouvoir*” or “*violation de la loi*” for instance (equivalent to *ultra vires*).

⁷⁶ LEROY (2000) avoids this issue in his treatise, is both an administrative law professor and Councillor on the Council of State. See discussion on the regulatory value of IGAs: *supra*, 5.3.1.

⁷⁷ CSAS 82.990 (20.10.1999) (*Versteegen*): by analogy since no decision has yet applied the “*acte détachable*” doctrine to cooperation agreements, except, perhaps implicitly, the CRASC decision, CSAS 79.517 (25.03.1999): *supra*, 5.3.1.

⁷⁸ The annulment of an “*acte détachable*”, such as a decision to contract, has no impact on the existence of the administrative contract itself, over which ordinary courts retain jurisdiction: LEROY (2000) 211.

⁷⁹ While the act of legislating can give rise to extra-contractual liability, liability for breach of contract is not directly addressed in the literature: MAHIEU, Michel, van DROOGHENBROEK, Sébastien, “La responsabilité de l’État législateur” (1998) *JT* 825-846; PAQUES, Michel, *De l’acte unilatéral au contrat dans l’action administrative*, (Brussels: Story-Scientia, 1991) 317-323.

authorities enjoy a limited degree of capacity to alter the terms of a contract, subject to compensation. Or it may simply be unthinkable. As one interlocutor told me “legislation cannot be retroactive, it cannot alter a duly formed contract”.⁸⁰ In other words, contracts are in general subject to legislation (the *Civil Code*, to start with), but it is not clearly established that the legislative branch can put an end to an existing contract concluded by the executive branch.

As we shall see, in Canada, it has long been admitted that legislators can undo acts of the executives.⁸¹ The same is simply not as evident in Belgium. In this context, the consideration that assemblies cannot legislate in contradiction to cooperation agreements with the status of contracts is far less surprising. For some authors, this is simply inconceivable. If contracts in general are not subject to legislative repudiation,⁸² this is a *fortiori* the case of “contracts” that can only be violated at the cost of a serious political crisis.

Were it to occur, it is arguable that the adoption of a contrary legislative or regulatory instrument could be analysed as a potential breach of a contractual undertakings (assuming the agreement crosses the threshold of juridicity). The injured party could then submit the conflict to a cooperation tribunal.⁸³ In the circumstances, the tribunal would likely find that the unilateral norms violate the agreement. In other words, the act of legislating or regulating would amount to a breach of contract (or, in civil law parlance, to a contractual fault). The tribunal could even order the payment of damages, which are directly enforceable. The tribunal would not, however, have the power of annulling the contrary unilateral normative act.⁸⁴

This would in a sense, introduce a process of inter-federal responsibility, for breaches of cooperation agreements, without necessarily altering the domestic legal order of each party. Paradoxically, despite the strong analogy drawn by authors with the superiority of directly applicable international law over the domestic legal order, this solution rests on a “dualist” conception of the relations between federal partners.

⁸⁰ Jean Michel FAVRESSE.

⁸¹ *Infra*, 6.2.2.2.

⁸² An issue which, I must insist, is not clearly resolved, but which is not even contemplated, since it seems so far-fetched.

⁸³ Assuming parties have agreed to its creation in the case of an optional one: *supra*, 4.2.2.2.

⁸⁴ This is the prerogative of the Court of Arbitration and the Council of State, when there is no exclusion to their jurisdiction, which, as the foregoing illustrated, is particularly contentious in the context of IGAs. The situation is the converse of the one that results when the decision to tender is annulled by the Council of State. This does not have any automatic effect on the contract: GOFFAUX and LUCAS (1998).

6.1.6 IGAs and the hierarchy of norms in Belgium: a summary

The foregoing leaves a strong impression that the place of cooperation agreements in the hierarchy of norms is a labyrinth of controversies. This is not quite true. In positive law, a number of issues are established. First, cooperation agreements, regardless of characterisation or mode of adoption, are subordinate to constitutional and quasi-constitutional rules. Secondly, cooperation agreements that do not require legislative assent are situated below legislation in the hierarchy of norms.⁸⁵ Thirdly, ordinary unilateral administrative action must respect agreements that have received legislative assent as well as those which meet criteria to qualify as regulatory instruments.⁸⁶

The only truly unresolved issue lies in the respective places of cooperation agreements that have received legislative assent and “ordinary” legislation, on the one hand, and of agreements that can be characterised as regulatory instruments and “ordinary” regulations, on the other. Analogies with the supremacy of international over domestic law have been invoked to consolidate the superiority of negotiated instruments over traditional unilateral norms. Despite the ideological appeal of this solution, which recognises the importance of the given word and of cooperation in the federal regime, a number of objections have been raised against such transposition.

Given the numerous uncertainties concerning the place which cooperation agreements occupy in the hierarchy of norms, authors have conjured other legal arguments in their search for precluding contrary unilateral action by a party to an agreement. Those include the “parallelism of forms” and “federal loyalty”. They are assessed in the third part of this chapter, alongside comparable doctrines invoked in the Canadian context.

6.2 Intergovernmental agreements in the hierarchy of norms in Canada

By contrast with the absence of judicial ruling on the issue in Belgium, some Canadian cases have laid down some ground rules on the place of IGAs in the hierarchy of norms, although this expression is never used. Whereas the approach in the previous section was deductive, the approach taken here is largely inductive. Judicial decisions are analysed so as to identify the principles that have guided courts to rank agreements in relation to classic norms of public law. However, in the absence of case law on some fundamental issues, the approach must also be deductive to a degree.

⁸⁵ Except in the hierarchy suggested by ERGEC (1998) 17 who does not explain his locating IGAs above DMAs. As we saw, in his last edition, UYTENDAELE (2001) 121 no longer distinguishes the two types of agreements in his hierarchy of norms.

⁸⁶ Assuming, of course, these are otherwise valid.

6.2.1 IGAs, quasi-constitutional and constitutional norms

6.2.1.1 IGAs, the Constitution and quasi-constitutional statutes

The subordination of IGAs to the Constitution in the Canadian system must be examined from three distinct angles. First, “constitutionalised” agreements are an integral part of the Constitution.⁸⁷ Their content is thus not subject to review on the basis of other constitutional norms.⁸⁸ Secondly, the relation between IGAs and entrenched fundamental rights does not raise particular difficulties. Indeed, IGAs must respect constitutional rules relative to fundamental rights, notably the *Canadian Charter of Rights and Freedoms*, and this, regardless of their legal characterisation.⁸⁹ If governments cannot institute discriminatory policies by themselves, they cannot do so together.

Along the same lines, the Federal Court ruled that IGAs could not abridge “quasi-constitutional” rights.⁹⁰ It will be recalled that in the *Contravention* case examined earlier, the federal government delegated to consenting provinces the emission of contravention and the prosecution of violation of certain federal statutes.⁹¹ Groups defending the rights of Franco-Ontarians initiated proceedings to ensure these services, which were until then subject to the federal *Official Languages Act* (OLA) would still be available in French after a transfer of this “administrative” responsibility to Ontario.⁹² The OLA does not bind provinces.⁹³ However, within the federal legal order, it enjoys “quasi-constitutional” status.⁹⁴ The Court ruled that no cooperative scheme pursuant to which the federal government delegates responsibilities to provinces can have the effect of abridging such “quasi-constitutional” rights.⁹⁵

⁸⁷ *Supra*, 4.1 (introduction) and 5.1.1.

⁸⁸ Although amendments to the Terms of Entry could be subject to the *Charter of Rights: Hogan v. AG Newfoundland*, (2000) 183 DLR 4th 225 (NFCA) 272 [*Hogan*].

⁸⁹ *Pineview Poultry Products Ltd. V. Canada*, [1994] 3 FC 475 (FCTD). Also, by analogy *Operation Dismantle v. R.*, [1985] 1 SCR 441 (*Charter* applies to cabinet decisions, that is, clearly political acts).

⁹⁰ The *Contravention* case, *supra*, 4.2.3.2.

⁹¹ *Supra*, 3.1.1.4, 3.2.1.1 and 4.1.3.

⁹² The concern was exacerbated by the fact that Ontario delegates certain prosecutorial powers to municipalities, which are not bound by the same language requirements as the provincial prosecutorial authorities. This (sub)delegation was also to apply to the prosecution delegated by the federal government to the province.

⁹³ *Official Languages Act*, RSC 1985, ch. 31 (4th suppl.) ss.2-3. Provinces have their own – and often very different - linguistic regime, a mixture of constitutional obligations and legislative provisions: MINISTÈRE DE LA JUSTICE, *Nouvelles perspectives canadiennes : lois linguistiques du Canada annotées*, Ottawa, 1998.

⁹⁴ *R. v. Beaulac* [1999] 1 SCR 768, 788-789.

⁹⁵ It bears pointing out, however, that the *Contravention* case dealt with the delegation to a province of the administration of an *exclusive* federal matter. When the federal government withdraws from an area in which it was previously involved through the spending power, the OLA does not apply. Provincial legal regimes would henceforth apply. In many cases, those provide less protection than the federal one: OFFICE OF THE COMMISSIONER OF OFFICIAL LANGUAGES: *Government Transformation: the Impact on Canada's Official Languages Program* (Minister of Public Works and

In sum, IGAs are clearly located below quasi-constitutional instruments in the hierarchy of norms. This would extend, for instance, to provincial Human Rights Codes, which are technically “ordinary statutes” but to which other provincial law must conform.⁹⁶

The third aspect of the relation between IGAs and constitutional norms relates to the subordination of the former to the official distribution of competences. Logically, if IGAs cannot violate entrenched rights, their violation of other constitutional provisions should render them invalid as well. Yet, as we saw in the discussion concerning the *ratione materiae* limitations to legally binding IGAs and the case law on the legal character of IGAs in Canada, the issue is not so simple.⁹⁷

Officially, of course, IGAs cannot alter the distribution of powers. We saw, however, that apart from precluding a direct transfer of legislative power from one order to another, courts show considerable tolerance regarding cooperative schemes that have undeniable para-constitutional effect. While this occurs in the context of IGAs meant to outline respective responsibilities in fields of concurrent or shared constitutional competences, courts have also shown deference regarding the use of IGAs in the context of the spending power, through which one order of government intervenes in the exclusive sphere of competence of another order. This can have the undeniable effect of blurring constitutional boundaries.⁹⁸

We saw that Belgian judges insist on the subjection of cooperation agreements to the formal distribution of powers. This is notably the case of the legislative section of the Council of State in its preventive function. Once a cooperation agreement has been implemented, however, the Court of Arbitration in its *a posteriori* control of constitutionality, will still reiterate the supremacy of constitutional norms, yet find ingenious ways of denying any violations of those norms. In Canada, there is no judicial rhetoric concerning the supremacy of the federal structure over IGAs. This creates an impression of judicial tolerance for the blurring of constitutional boundaries that is officially denounced in Belgium (although arguably admitted in practice).

The consequences in terms of positive law, is that only the supremacy of fundamental or “quasi-constitutional” rights affecting citizens directly can be affirmed with the same

Government Services Canada, no. SF31-35/1998) 17-25, 41; *Lavigne v. Human Ressource Development*, 2001 FCT 1365.

⁹⁶ SWINTON, Katherine, “The Enforcement of Intergovernmental Accords” in *INSTITUTE OF INTERGOVERNMENTAL RELATIONS, Accessing Access: Towards a New Social Union*, (Kingston: IIGR, 1997) 23.

⁹⁷ *Supra*, 4.1.2.2.

⁹⁸ Despite numerous opportunities, the Supreme Court of Canada has never definitely ruled on the constitutionality of the spending power: *supra*, 4.1.2.2.

degree of certainty in Canada as in Belgium. The supremacy of the formal distribution of competences over IGAs remains somewhat – and arguably in spite of basic logic - uncertain.

6.2.1.2 IGAs and provincial constitutions

The exact status of provincial constitutions is unclear in Canada, notably because the rules governing their adoption and amendments were altered with the adoption of the *Constitution Act, 1982*. Certain parts of provincial constitutions may be modified by ordinary provincial statute.⁹⁹ Others require formal constitutional amendment, with the concurrence of federal authorities.¹⁰⁰ In any event, within the provincial legal order, provincial constitutions have, at a minimum, “supra-legislative” (or “quasi-constitutional”) force. That is, even when they can be modified by ordinary statute, they take precedence over ordinary acts, much like the “quasi-constitutional” *Official Languages Act*,¹⁰¹ or provincial Human Rights Codes (which are arguably part of provincial constitutions, anyhow).

The consequence of the mixture of constitutional and “supra-legislative” status of provincial constitutions is that they should necessarily be situated above any IGA, even one that is “incorporated” through legislation. The same would obtain, *a fortiori*, if it does not enjoy legislative value. This also suggests that were a province to insert rules regarding IGAs in its own constitution, agreements would have to be consistent with those rules to be effective in the provincial legal order.¹⁰² These could provide, for instance, that all IGAs meeting certain criteria be submitted to the legislative branch.¹⁰³

If, however, the fact that aspects of provincial constitutions can be altered through regular statute implies that they only have legislative status, then rules concerning the respective place of IGAs and regular statutes, as described in the next subsection, would apply *mutatis mutandis* to the relation between IGAs and provincial constitutions. Basically, this would suggest that any clear contradiction between a provincial constitution and an IGA, would be resolved in favour of the former. In other words, regardless of the characterisation of provincial constitutions, they would take precedence over IGAs.

⁹⁹ TREMBLAY (2000) 48.

¹⁰⁰ When their Constitution is comprised in the *Constitution Act, 1867* as is the case of the constitution of the original provinces, or those governed by Terms of Entry: ss.41 and 45 of the *Constitution Act, 1982*; TREMBLAY (2000) 48.

¹⁰¹ *Supra*, 6.2.1.1.

¹⁰² Whether such rules would be considered “manner and form” limitations, or “quasi-constitutional” is unclear, but the result is similar. On “manner and form” limits to legislative freedom, see: ELLIOT (1991); *R. v. Mercure*, [1988] 1 SCR 234.

¹⁰³ As is the case in Belgium, of course: s.92*bis*.

6.2.2 IGAs and legislative instruments

6.2.2.1 An analogy with the intersection between the domestic and the international legal orders: a clearly dualist conception regarding IGAs

While the Belgian system is an ambiguous hybrid with regards to the intersection between the domestic and the international legal orders, the Canadian system is indubitably dualist.¹⁰⁴ As we saw, with a few exceptions, international treaties do not alter the domestic legal order, unless and until, they have been properly incorporated through legislative instruments.¹⁰⁵ This is true whether or not the content of the treaty could otherwise be qualified as “self-executing”.¹⁰⁶ This required incorporation counterbalances the executive’s exclusive competence to conclude and ratify treaties.

The statutes used to incorporate (or transform) norms of public international law into domestic legal norms are regular statutes, and not, as in Belgium, “*actes de haute tutelle*”, that is formal legislative acts with no direct normative value.¹⁰⁷ In Canada, such Acts are considered *on par* with other statutes. Hence, in view of the principle of parliamentary supremacy, a federal or provincial Act that incorporates an international treaty may also be abrogated, or supplanted by another Act that revokes this incorporation. As a result of such subsequent legislative action, Canada could be in violations of its international obligations, but in the domestic legal order, the Act would unquestionably be valid. In other words, the hierarchy of norms between international norms and legislation is clear. In case of a patent conflict, the latter will take precedence in the domestic legal order.¹⁰⁸

We saw that Canadian Courts have explicitly endorsed the analogy between this dualist conception regarding the intersection of the domestic and international legal orders and the relation between IGAs and ordinary statutes.¹⁰⁹ Unilateral legislative or regulatory norms remain “superior” to IGAs, unless the latter receive proper statutory incorporation. Once incorporated by proper statutory language (which is rare), an IGA will have the force of statute, nothing more. The assembly that proceeded with the incorporation can always

¹⁰⁴ There is a presumption that domestic law is consistent with customary international law. However, in case of express conflict between the two, the former has precedence: *Gordon v. R.*, 1980 5 WWR 668 (BCSC); *Entreprise de rebuts Sanipan v. Québec*, [1995] RJQ 821 (CS).

¹⁰⁵ *Supra*, 5.2.2.3.

¹⁰⁶ That is creating rights and obligations that are sufficiently particularised to be directly applicable in a monist regime, for instance. On this, *supra*: 6.1.2.1 (and footnotes).

¹⁰⁷ *Supra*: 6.1.2.1.

¹⁰⁸ Although, of course, courts will attempt to provide a compatible interpretation: *Re Tax on Foreign Legations*, [1943] SCR 208; HOGG, Peter, *Constitutional Law of Canada*, Loose-leaf ed., vol. I (Toronto: Carswell, to date March 2003) 11-6.

¹⁰⁹ *Re Anti-Inflation Act*, [1976] 2 SCR 373; *Unilever Canada Inc. v. A.G. Québec*, [1999] RJQ 1720 (S.C.) [the “*Colour of Margarine case*”]; *supra*, 5.2.2.3.

withdraw it, or legislate in contradiction with the IGA to which it has previously given force of law. This is further explored in the following sub-section.

6.2.2.2 Parliamentary sovereignty and IGAs

This endorsement of dualism flows from the principle of Parliamentary sovereignty. The Canadian Constitution explicitly provides that it is “similar in Principle to that of the United Kingdom”,¹¹⁰ a pillar of which is parliamentary sovereignty.¹¹¹ In its absolute form, the principle signifies that there are no legal bars (as opposed to political constraints or traditions) to the supremacy of the legislative branch of government. A legislative assembly may legislate over any matter, and to any effect. Courts must apply duly adopted legislation, irrespective of its content. Even in the United Kingdom, however, the principle has been curbed by constitutional conventions,¹¹² and the primacy recognised to European Community law.¹¹³ As we shall see, in the context of IGAs, the Supreme Court of Canada has defended an even stricter reading of parliamentary sovereignty than present day Britain.

Obviously, transposed in a federal system, the supremacy of Parliament is distributed between the various legislative assemblies.¹¹⁴ In the Canadian system, courts may review the conformity of federal or provincial legislative measures to the formal distribution of competences.¹¹⁵ Since the entrenchment of the *Canadian Charter of Rights* in 1982, courts have also conceded that parliamentary sovereignty is now constrained by the protection of fundamental rights. Yet, in the 1991 *CAP Reference*, to which we now turn, the Supreme Court of Canada defended a very classic, almost Diceyan, conception of parliamentary sovereignty. While admitting that the principle is curbed by the formal distribution of competences and fundamental rights, it rejected any suggestion that adjustment were also imposed by the imperatives of cooperative federalism.

¹¹⁰ Preamble, *Constitution Act*, 1867.

¹¹¹ For a traditional conception: WADE, William, “Sovereignty - Revolution or Evolution?”, (1997) 112 *LQR* 568-575. For a more flexible approach: ALLAN, Trevor, “Parliamentary Sovereignty: Law, Politics and Revolution” (1997) 112 *LQR* 443-452.

¹¹² JENNING, Ivor, *The Law and the Constitution*, 5th, (London: U. of London Press, 1959); On constitutional conventions in Canada: *infra*, 6.3. On the potential recognition of limits to parliamentary sovereignty through non-binding concordats: POIRIER, *Concordats* 153-154.

¹¹³ *R. v. Secretary of State for Transport, ex p. Factortame*, [1991] AC 603. Opinions are divided on the attitudes British Courts would take if an Act of the Westminster Parliament were to expressly contradict an European norm: CRAIG, Paul, *Administrative Law*, 4th ed. (London: Sweet and Maxwell, 1999) 300 ff.

¹¹⁴ TREMBLAY (2000) 133-135. In fact, Dicey himself recognised that the sacrosanct principle of parliamentary sovereignty was ill-adapted to the federal context: DICEY, Albert Venn, *Introduction to the Study of the Law of the Constitution*, 10th ed., (London/NY, Macmillan, 1959) 138-181.

¹¹⁵ While Superior Courts have this jurisdiction over any statute (provincial or federal), the jurisdiction of the federal Court to review the constitutionality of statutes is more complex: SGAYIAS, David et al., *Federal Court Practice*, (Toronto/Montréal: Carswell, 2002) 8-16.

- **The *Canada Assistance Plan Reference***

The *CAP Reference* is the key decision concerning the status of IGAs in Canada, and is often the only one referred to in the literature.¹¹⁶ The *Reference* raised a number of legal issues relating to IGAs, some of which are examined in later sections of the present chapter.

In 1967, a federal Act authorised the executive to conclude IGAs with provinces concerning the federal contribution to provincial social assistance and welfare programmes. The Act - the *Canada Assistance Plan* - provided that federal contributions would cover half of the provincial costs of certain approved programmes. It placed conditions on some expenditures, but generally left provinces free to establish programming and spending. It also provided that the agreements would remain in place as long as the relevant provincial implementing legislation was in force. Finally, it stipulated that the agreements could be terminated by mutual consent, or after a minimum one-year notice by one of the parties.¹¹⁷ The Act did not address the rules governing its own amendment but it subjected the modification of federal regulations to provincial consent.

Within one year, bilateral agreements had been concluded between the federal government and all ten provinces. Amongst other things, the IGAs dealt with the timing and methods of payment. The denunciation clause found in the federal legislation was replicated in the agreements. The formula for calculating the federal contribution was not, however, reproduced in the IGAs: it remained solely in the federal Act.

With half of their costs covered by the federal Treasury, wealthy provinces instituted costly social services. In 1990, wishing to limit this form of “consumer federalism”, the federal government introduced a Bill into Parliament which set a ceiling (thus the expression “*Cap on CAP*” coined at the time) on its contribution to the three richest provinces.¹¹⁸ The federal government unilaterally modified the arrangement by changing the contribution formula contained in the federal Act.¹¹⁹ It did not actually repudiate the IGAs, but it is clear

¹¹⁶ The case was also briefly examined in the discussion on the contractual character of IGAs, since without pronouncing on the status of an IGA *per se*, the Supreme Court denied that cost-sharing arrangements were “ordinary contracts”: *supra*, 4.1.3. Unless otherwise noted, references are to the Supreme Court’s opinion.

¹¹⁷ S.8(d) *in fine*. Sopinka J. seems to have given an erroneous interpretation of this article, by suggesting that any party could terminate the agreement “at will”: *CAP Reference*, 554. In fact, legislation was required to end without respecting notice period.

¹¹⁸ Defined as the provinces which did not receive equalisation payments. The CAP implied that further increases in federal contribution to Alberta, British Columbia and Ontario would henceforth be limited to 5% per year. In other words, if Ontario were to increase its social spending by 20%, the federal government would no longer cover half of this increase.

¹¹⁹ Until then, the federal legislation had never been amended, although regulations were: *CAP Reference*, 533. The Act provided that federal regulations would not be adopted or modified without provincial consent, which was apparently obtained.

that the whole system was altered without provincial consent, and the changes were made without regard to the notice of termination clauses included both in the Act and in the agreement.

British Columbia - one of the affected provinces - attempted to stop this federal unilateral action through a Reference procedure before its Court of Appeal. Aboriginal groups and several provinces intervened to support B.C.'s position, including some that were not affected by the measure. Ottawa's unilateral action had clearly generated disarray within the federation. Summarising the position of several provinces and interveners, Lambert J.A. of the BC Court of Appeal declared:

“If Canada were to have intentionally broken a solemn undertaking incorporated in a formal agreement, then not only would the whole basis of cooperative federalism collapse, but the fabric of the relationship between Canadians and their own national government would be undermined. So would Canada's international relationships and treaties. If Canada is willing to breach its agreements by passing legislation to authorize, or even require the breach, then Canada cannot expect to conclude agreements with contractors to build airports, nor to settle native land claims by agreement. [...] I expect that the overwhelming majority of Canadians would say that this country must be as good as its word.”¹²⁰

The Supreme Court of Canada disagreed. It emphasised that most of the wording of the federal Act was replicated in the various IGAs, with the notable exception of the formula setting the federal contribution, which was only inserted in the federal statute.¹²¹ For the Court, parties had to know that this made them subject to unilateral legislative amendment and:

“[i]n lieu of relying on mutually binding reciprocal undertakings which promote the observance of ordinary contractual obligations, these parties were content to rely on the perceived political price to be paid for non-performance”.¹²²

This is not quite true. The IGAs provided that parties could not denounce them except through mutual consent or with a one-year notice. It is the legislative assemblies, which are NOT party to the agreements, which can act unilaterally, at least according to the Court's interpretation of parliamentary sovereignty. By contrast, an executive cannot adopt

¹²⁰ *Re Canada Assistance Plan*, (1990) 46 BCLR (2d) 273, 294.

¹²¹ *CAP Reference*, 546-554. The Court added that the arrangement recognised the principle of parliamentary sovereignty embodied in s. 42 of the federal *Interpretation Act* pursuant to which “Every Act shall be so construed as to reserve to Parliament the power of repealing or amending it [...]”. In any event, for the Court, the principle would apply even in the absence of the *Interpretation Act*.

¹²² *CAP Reference*, 554.

regulations to put an end to its own contractual obligations unless it has express legislative authority to do so.¹²³ In other words, executives may be bound by an agreement. However, they can always use the legislative assembly - which they nearly always control - to put an end to their obligations. In other words, the Court tended to conflate the potential legal character of IGAs with their place in the hierarchy of norms.

In fact, the provinces conceded that the federal government could not have prevented Parliament from amending the contribution formula contained in the federal Act. They argued that the *government* should not introduce legislation into Parliament that unilaterally modified a compact that had been in place for over two decades. They did so through a clever recourse to the doctrine of legitimate expectations. The Supreme Court rejected this dichotomy between the executive and legislative branches. The parliamentary system would be “paralysed” if the doctrine were used to prevent the executive from introducing legislation. In this context, a “restraint on the executive in the introduction of legislation is a fetter on the sovereignty of Parliament itself”.¹²⁴

The Supreme Court affirmed that the CAP arrangement also recognised the sovereignty of provincial legislatures, since the agreements were to remain in force as long as the relevant provincial legislation was in place. In other words, while the IGA itself could only be modified or terminated by mutual consent or with a one-year notice, Parliament and the provincial legislatures enjoyed an equal power to denounce them. In practice, of course, this equality translated into very different results. While federal authorities could unilaterally alter their contribution through legislation, the only “privilege” of unilateral provincial legislative withdrawal from the scheme would be to lose the federal contribution altogether. In other words, provincial legislatures could hardly take advantage of their sovereignty.

In sum, for the Supreme Court, the doctrine of parliamentary sovereignty is only restricted by two elements: the official distribution of legislative powers and the Charter of rights. Consequently, a legislative assembly can always unilaterally denounce an IGA, or legislate in terms that contradict the content of the IGA, provided it does so in clear and explicit terms. This does not mean that the agreement does not bind governments. It means that nothing precludes a legislative assembly from acting in violation of this agreement, even if it has authorised its conclusion, approved or even incorporated it.

The irony is that in the Canadian parliamentary system, the executive nearly always carries a majority in the legislative assembly, and can therefore use the latter to free itself

¹²³ *Wells v. Newfoundland*, [1999] 3 SCR 199 [*Wells*, discussed *infra*]; *Cité d'Outremont v. Commission de Transport de Montréal*, [1955] QB 753; ISSALYS and LEMIEUX (1997) 527.

¹²⁴ Particularly since bills relative to public spending may only be introduced into Parliament by the executive (ie not by private members): s.54, *Constitution Act*, 1867. *CAP Reference*, 559.

from prior commitments, even legally binding ones.¹²⁵ In the *CAP Reference*, Parliament was clearly an instrument of the executive, and its sovereignty, an effective cover for executive action. The Supreme Court was much more critical of this trick in the hand of the executive in the following decision.

- **The Wells decision**

Indeed, the capacity of an Executive to introduce legislation in order to dodge contractual obligations was recently criticised by Supreme Court. The case did not involve an IGA, but an employment contract between a public official and a provincial government. Some of the findings are, however, apposite in the present context.

The Newfoundland legislature restructured a Public Utilities Board, leading to the abolition of a Commissioner's position. Unsurprisingly, this was considered admissible legislative action. For the Supreme Court, however, what was inadmissible was for the executive, which basically sets the legislative agenda, to argue that it could not honour labour contracts on the grounds that the law had changed. In this case, Newfoundland's argument seemed particularly cynical since it could have re-appointed the dismissed Commissioner to the newly created Board, but chose not to. The Court recognised that the separation of powers is an essential feature of the Canadian constitutional system. However,

“[t]he government cannot [...] rely on this formal separation to avoid the consequences of its own actions. While the legislature retains the power to expressly terminate a contract without compensation, it is disingenuous for the executive to assert that the legislative enactment of its own agenda constitutes a frustrating act beyond its control”.¹²⁶

In fact, the government had issued a directive pursuant to which Mr. Wells would not receive compensation for the termination of his contract. True to its extensive interpretation of parliamentary sovereignty, the Supreme Court held that a legislature has the “extraordinary power”, through clear and explicit language, of legislating to deny compensation for the breach of a government contract. But the government party to that contract could not do so, especially not through a directive. For the Court:

“[t]here is a crucial distinction, however, between the Crown legislatively avoiding a contract, and altogether escaping the legal consequences of doing so [...] In a nation governed by the rule of

¹²⁵ In this context, the legislative assembly may act as an “elected dictatorship”: Lord HAILSHAM, quoted in BARENDT, Eric “Is There a UK Constitution?”, (1997) *Oxford JLS* 137-146, 138. Or, in the words of Elazar: cabinet is the “tail that wags the parliamentary dog”: ELAZAR, Daniel J., “Contrasting Unitary and Federal Systems”, (1997) 18: 3 *Int'l Political Science Review* 237-251, 246.

¹²⁶ *Wells*, 220.

law, we assume that the government will honour its obligations unless it explicitly exercises its power not to.[...] To argue the opposite is to say that the government is bound only by its whim, not its word. In Canada, this is unacceptable, and does not accord with the nation's understanding of the relationship between the state and its citizens".¹²⁷

In the *CAP Reference*, the Court had considered the Executive as an integral part of the legislative branch of government. In *Wells*, this vision of the separation of powers was turned on its head: the Court reasoned that since it controls the legislature, the executive's actions must be controlled so as to avoid an abusive result. The Court did not actually overturn its previous case law. On the contrary: it repeated that the legislature "retains the power to expressly terminate a contract without compensation". Nevertheless, the Court severely criticised the government's duplicity in arguing that it could not comply with its contractual obligations while at the same time being the source of the impossibility of execution. It issued a strong call for an application of good faith in contractual *and governmental* action.

If this is correct, then I see no reason why the Court's concern with the rule of law should not extend to legally binding IGAs. This does not imply a modification of the hierarchy of norms: parties to an IGA could always legislate to counter an IGA. They may, however, be liable for damages if they do so without express legislative language to that effect. Hence, the potential impact of the *Wells* decision on IGAs could be both to reinforce the supremacy of legislation over IGAs (given the reiterated power of parliamentary sovereignty), and the binding character of IGAs *inter partes*, when executives stop short of resorting to explicit legislation.

• The Churchill Falls Reference

While the *Wells* decision does not alter the traditional conception of parliamentary sovereignty, the *Churchill Falls Reference* has the effect of curbing the power of provincial legislatures to repudiate IGAs unilaterally.¹²⁸ It is discussed here despite the fact that it was rendered ten years before the *CAP Reference*, because its potential impact is better understood against the impact of the latter. At issue in the *Churchill Falls Reference* was a contract between two Crown Corporations. The dispute nevertheless directly involved the governments of Québec and of Newfoundland. Moreover, the intervention of the Newfoundland legislature raised relevant questions in the context of the place of IGAs in the hierarchy of norms.

¹²⁷ *Wells*, 216 and 218.

¹²⁸ *Churchill Falls (Labrador) Corp. Ltd. v. A.G. Newfoundland*, [1984] 1 SCR 297 [further references are to paragraphs of the electronic version].

In 1961, Newfoundland granted a lease to the Churchill Falls Corporation to develop a hydroelectric project. The lease was ratified by a statute. In 1969, the company concluded a contract with Hydro-Québec, which would provide major investments in exchange for most of the electricity generated by the project for a period of up to 65 years. The contract was governed by the law of Québec and any dispute was to be submitted to Québec courts.¹²⁹

In the mid-70s, Newfoundland used different strategies to recuperate some of the electricity produced at Churchill Falls. In 1980, the legislature adopted an Act repealing the Churchill Falls Corporation's lease and expropriating its assets, thus rendering it incapable of fulfilling its contractual obligations to Hydro-Québec. The Act stipulated the compensation to which the company was entitled. A few months later, the government of Newfoundland, facing legal action in Québec, submitted the constitutionality of its statute to its Court of Appeal through a reference procedure. The Court ruled the statute constitutional. As in the *CAP Reference*, the Supreme Court disagreed.

First, the Court rejected the submission that the 1980 statute merely repealed the one that ratified the lease in 1961. For the Court, the subsequent statute constituted a "colourable attempt to do indirectly what it could not do directly".¹³⁰ In other words, if Newfoundland could not have put an end to the contract (to which it was not even party), it could not do so through legislation. Secondly, the statute exceeded provincial powers because in its "pith and substance", it altered civil rights (the contract) situated outside the province's territory.¹³¹ Put another way, the statute had extra-territorial effect and thus exceeded provincial competences.¹³²

In the *CAP Reference*, Manitoba invoked the *Churchill Falls Reference* in support of its argument that federal partners cannot legislate to terminate contractual obligations that exceed their exclusive constitutional competences, taken in a broader (what I would call "material") sense.¹³³ It submitted that once properly made, an IGA is no longer within the exclusive competence of one particular party. This is particularly so when the IGA is used as an instrument of the spending power and relates to exclusive provincial matters (such as health and social assistance). Consequently, rescinding such an IGA requires the consent of other parties to it, and cannot proceed through unilateral legislative action. The Supreme

¹²⁹ *Churchill Falls Reference*, par. 10.

¹³⁰ *CAP Reference*, 567.

¹³¹ *Churchill Falls Reference*, par. 44-60. The Newfoundland Court of Appeal had found that the expropriation related to rights and property located within Newfoundland.

¹³² Territorial limits to provincial powers are inferred from the terms "in the province" in ss. 92(13) and 92(16), *Constitution Act, 1867*.

¹³³ *CAP Reference*, 565.

Court dismissed the argument, insisting that the *Churchill Falls Reference* had turned on the “territorial” limits of provincial powers.¹³⁴

This clarification of the situation by the Supreme Court in the *CAP Reference* has some potentially far-reaching consequences. It suggests that a province party to a legally binding IGA may not legislate to put an end to its undertakings if the seat of the IGA is outside the province.¹³⁵ For instance, a Québec-Ontario IGA that designates the law of Ontario as the applicable law, or that was signed in Toronto, could potentially be denounced by the Ontario legislature. It could not, however, be repudiated through a Québec statute, which would have extra-territorial effect.

Furthermore, while provincial legislatures face territorial limitations, this is not the case of the federal Parliament. Hence, a second potential consequence of the ruling is that a federal Act denouncing a vertical IGA could be constitutional, while a provincial Act seeking to do the same may not be. In other words, parliamentary sovereignty would have a greater disruptive power in the case of vertical IGAs (and then again, only in the hands of federal authorities) than in the case of horizontal IGAs.¹³⁶

A solution, which is clearly endorsed in certain cases, is to subject IGAs to the law and the courts of the provincial party to a vertical agreement.¹³⁷ Assuming this is sufficient to situate the IGA within that province (as it was in *Churchill Falls*), this would guarantee the sovereign capacity of each party to legislate to put an end to the IGA. This leaves the problem of multilateral IGAs, which can be governed by the law of one particular province, which can then be in a better position to rescind its obligations through legislation than other provinces.¹³⁸

In the *CAP Reference*, the Supreme Court contended that parliamentary sovereignty benefited federal and provincial orders equally. Yet, by insisting that the unconstitutionality of the Newfoundland Act in the *Churchill Falls Reference* was based on the territorial – as opposed to material – limitations to provincial competences; it implied that federal and

¹³⁴ Again, the Supreme Court refused to directly denounce – or endorse – the constitutionality of the spending power: *CAP Reference*, 566-567.

¹³⁵ The determination of the seat of government contracts proceeds through the application of private international law analysis. I see no reason why the same would not apply to IGA.

¹³⁶ If the IGA were “situated” in Ottawa, this would arguably give an advantage to Ontario over other provinces.

¹³⁷ Agreement Regarding Delivery of Health Care and Treatment Services to Veterans, 08.06.1990 (BC00545), s.19 (BC law applicable); Entente concernant le recours aux services des inspecteurs de la sécurité ferroviaire du Ministère des transports du Canada, 4/27.05.1998 (SAIC 1998-015) s.14 (QC law governs and QC courts have jurisdiction).

¹³⁸ In the absence of federal common law (with some inapplicable exceptions) in Canada, government contracts are always governed by provincial law: *Laurentide Motel v. Ville de Beauport*, [1989] 1 SCR 705, 722 and 737; *Just v. BC*, [1989] 2 SCR 1228.

provincial legislative assemblies may not be on an equal footing with regards to IGAs. While territorial limitations to provincial powers logically flow from the territorial nature of the Canadian federal regime, this differential impact in the case of intergovernmental relations is a kink to the theory of equality of federal partners.

At the outset of my research, the only certainty I had regarding the status of IGAs in Canada was that – in positive law - they were susceptible to unilateral repudiation through legislative action. This is almost universally admitted, and is certainly the clear message conveyed by the Supreme Court in the *CAP Reference*. But even this certainty requires some nuance.

First, while the *Wells decision* confirms that in the end, a statute will always take precedence over an IGA (or a contract, or a treaty) if it contradicts it in clear and express terms, it summons the executive to act in good faith when introducing legislation. I see no reason why this invitation to act in good faith should not extend to executives in relation to IGAs. Secondly, despite claims that provincial and federal authorities can equally use the sword of parliamentary sovereignty to free themselves from binding IGAs in the *CAP Reference*, the likely unintended consequences of the *Churchill Falls Reference* is that provinces may see their access to the sword somehow more restricted than federal authorities.

As will be apparent in the concluding chapter of this thesis, it is not the limitations to the freedom to act in contradiction to promises between governments that I regret. Nor, *a fortiori*, appeals to government to act in good faith. It is the differential impact on the freedom of action of federal partners that is problematic in terms of federal theory.

6.2.3 IGAs and regulations

Despite these nuances, the supremacy of unilateral legislative instruments over IGAs is established in Canada. What is the respective place of IGAs and regulations in the hierarchy of norms?

If an IGA is incorporated by statute, it should normally take precedence over regulations. In this case, the hierarchy is classically between a statute and subordinate legislation. This issue was central to the *Colour of Margarine* case, where the Superior Court of Québec rejected the argument that the order-in-council approving the Internal Trade

Agreement had the effect of implicitly abrogating provincial regulations.¹³⁹ This order-in-council authorised the Premier (and the Minister of Intergovernmental Affairs) to sign the agreement, but it did not have the effect of altering domestic law. Moreover, legislative approval did not have the effect of setting aside existing regulations. For the Court, the Internal Trade Agreement is an:

“agreement between governments who are sovereign in their respective spheres of legislative competence [...] The assertion that the ITA allows the government of one province to obtain a judicial order to force another provincial government to abrogate its regulations is erroneous.”¹⁴⁰

It bears pointing out that Québec government had undertaken - in writing - to modify its margarine regulation, but had failed to do so. It had even published a proposed new regulation which would have allowed the sale of butter-yellow margarine but did not promulgate it.¹⁴¹ In these circumstances, the Court denied that the legislative approval of the ITA could have had the effect of implicitly abrogating the regulation. This leaves open the possibility that in other circumstances, an argument could be made that the statutory approval of an IGA has the effect of implicitly modifying existing regulations. The safest conclusion at this stage, however, is that IGAs that are not incorporated remain subordinate to unilateral regulations in the domestic legal order of each party.¹⁴²

6.2.4 IGAs and administrative acts or decisions

Are administrative acts and decisions located below IGAs in the hierarchy of norms? In other words, could a court grant administrative law remedies against an administrative act or decision that violates an IGA? Administrative acts and decisions must obviously respect constitutional, legislative and regulatory norms. They would therefore be subject to IGAs that have constitutional, legislative and (assuming this were possible) regulatory status.¹⁴³ The question is more complex with regards to IGAs which do not have such normative value in positive law.

In the *Finlay* judicial saga, a recipient of social assistance launched administrative law proceedings against Manitoba authorities and federal authorities for failure to respect the conditions set out in the *Canada Assistance Plan*. The Manitoba authorities had decided to

¹³⁹ *Unilever Canada Inc. v. A.G. Québec*, [1999] RJQ 1720 (SCQ) [the “*Colour of Margarine case*”] p.30 of electronic version.

¹⁴⁰ *Colour of Margarine case*, p.34 of electronic version.

¹⁴¹ Possibly so as not to alienate milk producers, prior to provincial elections.

¹⁴² See also *BC Egg Marketing Board v. Sprucewood Farms Ltd*, BCSC A902400 (canlii) and *Re Lofstrom and Murphy et al.*, (1971) 22 DLR (3d) 120 (SKCA).

¹⁴³ *Supra*, 5.2.2 and 5.3.2.

to recover overpayments received by Mr. Finlay by reducing his monthly allowance by 5%. Manitoba received conditional grants from Ottawa under the CAP. One of the conditions was that the level of assistance should cover “basic requirements”. Mr. Finlay went to court and argued that with the cost-recovery his basic needs were certainly not met. His legal odyssey lasted a couple of decades. First, he launched a judicial review process before the Manitoba courts to challenge the legality of the Manitoba decision.¹⁴⁴ Having lost, he turned to the Federal Court, where he argued that federal Ministers’ approval of transfers to Manitoba was illegal because the federal legislation authorising the payment referred to conditions contained in the IGA, which Manitoba was allegedly violating. In the end, he also lost this battle on the merits.¹⁴⁵

In the last of the string of *Finlay* decisions, McLaughlin J., dissenting on other issues, stated that government policy cannot violate an IGA.¹⁴⁶ The context does not specify what kind of IGA she had in mind, although the agreement at issue in *Finlay* had been authorised, but neither approved nor incorporated by legislation. In other words, it did not have the force of statute. There is no indication that it had regulatory force either. This makes the foundations for requiring that public policy respect an IGA somewhat unclear. In fact, as we saw in Chapter 5, such third party administrative law challenges are rarely directed at the IGA itself, or alone. For instance, without qualifying the Manitoba-Ottawa agreement in the CAP, the Supreme Court framed the question as whether the federal legislation “and the agreement made pursuant to it” required the province to provide a minimum level of social assistance.¹⁴⁷ Some attempt is always made to tie an obligation to some unilateral legal source. But it was difficult to argue some violation of federal or provincial unilateral instruments only. The IGA was truly central to the source of obligation.¹⁴⁸

As was canvassed in Chapter 5, the complex web of federal and provincial Acts, regulations and IGAs is sometimes so tightly woven that it is nearly impossible to unravel. The precise source of legal obligation becomes elusive.¹⁴⁹ For example, producers have challenged the application of quotas by provinces, when these quotas are set through intergovernmental schemes. In such cases, the actions of provincial officials are clearly conditioned by an (unincorporated) IGA, but also by other source of provincial law. In those

¹⁴⁴ It was in this context that the Supreme Court granted him “public interest standing: *Finlay v. Canada (Minister of Finance)*, [1986] 2 SCR 607, *supra*, 4.1.3.

¹⁴⁵ *Finlay v. Canada (Minister of Finance)*, [1993] 1 SCR 1080 [*Finlay*, 1993]. The case is a telling illustration of the difficulties which the dual judicial system generates for the review of multi-level administrative action.

¹⁴⁶ *Finlay*, 1993, 1117 (McLaughlin J., diss.)

¹⁴⁷ *Finlay*, 1993, 1088.

¹⁴⁸ BLACKMAN (1993) 72 notes that at a minimum the case stands for the proposition that governments must conform with their own legislative requirements in implementing IGAs.

¹⁴⁹ The “network” paradigm may therefore better account for this reality than the hierarchical paradigm: *infra*, General Conclusions.

cases, courts will typically mention the IGA, sometimes explain that it is binding on the province (without further enquiry) and then confirm the validity of the quota or grant an injunction to force the producer to respect quotas.¹⁵⁰ As we saw in Chapter 5, however, such deference for cooperative scheme is not systematic, and when there is a clear conflict between the content of an IGA and a unilateral norm, the latter will generally be given precedence.¹⁵¹

The muddle concerning the normative foundations for administrative action is compounded by problems of interjurisdictional immunities which result from the largely dual nature of the Canadian judicial system.¹⁵² We saw that Belgian courts are not split along federal lines, but are divided pursuant to arcane *ratione materiae* criteria. The result requires a watch-maker's precision to characterise instruments, identify norms and determine the nature of legal disputes.¹⁵³ This is not essential in the Canadian context, since (with certain exceptions), provincial Superior Courts can rule on constitutional, contractual or administrative issues. The major exception – which is relevant here – relates to the judicial review of acts and decisions of federal officials, over which the Federal Court has exclusive jurisdiction.

This creates a dilemma when an official of one order is charged with missions by another order, or when it is actually difficult to determine the legal source of authority of an official, who acts in partial implementation of an IGA. Mr. Finlay had to challenge provincial decisions before Manitoba courts, then federal decisions before the Federal Court. The fact that the Supreme Court sits on final appeal in each case may help resolve legal inconsistencies, but it does not simplify the procedural hurdles faced by citizens challenging administrative decisions. Mr. Finlay paid a couple of visits to the Supreme Court.

In the *Canadian Environmental Law Association* case,¹⁵⁴ the Federal Court, which seemed to doubt its jurisdiction to rule on the validity of an IGA (given that it cannot be analysed as the sole act of a federal official), chose a solution that is reminiscent of the

¹⁵⁰ *Fédération des producteurs de volailles du Québec v. Pelland*, 705-05-004614-007 (01.11.2001) (SCQ); *Fédération des producteurs de volailles du Québec v. Monette*, 505-05-002793-963 (20.02.1997) (SCQ).

¹⁵¹ *BC Egg Marketing Board v. Sprucewood Farms Ltd*, BCSC A902400 (canlii), 11; *Martinoff v. Canada*, [1994] 3 FC 33 (FCA); *Ontario (Chicken Producer's Marketing Board) v. Canada (Chicken Marketing Agency)*, [1993] 1 FC 116 (FCTD); *supra*, 5.3.2.

¹⁵² *Supra*, 1.2.3.

¹⁵³ SAUNDERS asserts that the unicity of the court system in European federations facilitates the judicial control of intergovernmental mechanisms in comparison with the essentially dual character of the Australian one. She does not address this particular problem (nor does she discuss the Belgian case): SAUNDERS, Cheryl, "Constitutional and Legal Aspects", in GALLIGAN, Brian, et al., eds., *Intergovernmental Relations and Public Policy*, (Sydney: Allen & Unwin, 1991) 39-56.

¹⁵⁴ *Canadian Environmental Law Association v. Minister of the Environment*, FCTD, T-337-98 [the CELA decision]; *supra*, 4.1.3.

“*actes détachables*” doctrine in Belgium.¹⁵⁵ Rather than question whether an IGA contravened federal law, the Court considered whether the Minister’s decision to conclude the agreement did so. In other words, it sought to hook its jurisdiction on some unilateral act. The case did not relate to an administrative decision pursuant to an IGA *per se*. It illustrates both the inadequacy of the judicial structure given the intergovernmental character of major portions of public administration, and the creativity which can be shown, in Canada as in Belgium, to attempt to palliate these difficulties.¹⁵⁶ Faced with obstacles flowing from cooperative action, in positive law, this creativity can only go so far, however.

6.2.5 IGAs as contractual instruments and the hierarchy of norms

Given the predominant conception of IGAs as contractual instruments in Canada, the foregoing discussion clearly established that IGAs *qua* contracts are located below the Constitution, legislation and regulation in the hierarchy of norms. They only escape this formal subordination when they obtain constitutional or legislative status through some external formality.

The foregoing also established that an IGA meeting the required indicia of legal status binds governments party to them. Absent legislation repudiating the IGA (or regulations clearly authorising such repudiation) *and* express provisions denying compensation, the other party could be entitled to contractual remedies. In other words, as the *Wells* case decided, contrary legislation can constitute a contractual breach. In view of the extensive interpretation given to parliamentary sovereignty by the Supreme Court, even in the context of intergovernmental relations, it appears that in positive law, one order of government could legislate to expressly deny compensation to another order party to an IGA which is unilaterally repudiated. The best – and likely most effective – solution in such case could be an action in declaratory judgement to have the breach judicially acknowledged.¹⁵⁷

6.2.6 IGAs and the hierarchy of norms in Canada: a summary

UYTTENDAELE proposed a template to defend his thesis regarding the place occupied by cooperation agreements in the hierarchy of norms in the Belgian context.¹⁵⁸ The following is an attempt to do the same for Canadian IGAs. The exercise illustrates a number of unresolved issues (uncertainties are left in bold).

¹⁵⁵ *Supra*, 6.1.4.

¹⁵⁶ For a similar solution in Belgium: CSAS 79.517 (25.03.1999) (*CRASC*): *supra*, 5.3.1.

¹⁵⁷ Declarations are nearly always honoured: *Finlay v. Canada (Minister of Finance)*, [1993] 1 SCR 1080, 1117 (per McLaughlin, J., diss.).

¹⁵⁸ *Supra*, 6.1.2.

- Constitution – “**constitutionalised**” agreements¹⁵⁹
- Provincial constitutions
- Legislation of either order of government - IGAs that have the force of law (incorporated)
- **IGAs approved by statute which explicitly provides that an IGA is to supersede existing regulations or other statutes**¹⁶⁰
- Regulation of either order of government
- **IGAs that are authorised or approved by legislation (absent the “superseding” clause mentioned above) – IGAs that are approved or authorised by order-in-council – administrative acts and decisions**
- **IGAs that are not approved by order-in-council, when such approval is required by legislation – administrative acts and decisions**¹⁶¹

In sum, apart from “constitutionalised” IGAs, agreements between governments in Canada are subordinate to the domestic law of each party, unless they have been incorporated by legislation. This is the case of a tiny minority of agreements. While clearly a major determinant in public administration, IGAs are situated at the very bottom of the formal hierarchy of norms. As in the Belgian case, the lower part of the hierarchy is much murkier than the top one. The relevance of the hierarchical model in this context is questioned in the concluding chapter.

6.3 Protecting IGAs from unilateral action: a range of legal doctrines

In both federations, various legal doctrines have been invoked to preclude unilateral action that runs counter to an IGA, even when this action is - *a priori* - valid pursuant to the formal hierarchy of norms.¹⁶² While these are closely connected to the doctrines of estoppel, detrimental reliance and legitimate expectations which were examined in Chapters 4 and 5, they do not have identical objectives.¹⁶³ In those chapters, these doctrines were examined for their potential to provide legal remedies to affected third parties or parties to an IGA, when the latter does not cross the threshold of juridicity, whether as normative instrument *erga omnes*, or as contractual instrument. In other words, the idea was to give legal effect to IGAs deprived of formal legal character.

The legal doctrines examined below are also grounded on the fundamental premise that governments should – somehow – be held to their word. They do not constitute

¹⁵⁹ Despite the fact that third parties may not always derive the benefits of such agreements: *supra*, 5.1.1.

¹⁶⁰ The *Colour of Margarine* case.

¹⁶¹ Because in such cases, the IGA would be invalid. In jurisdiction where such approval is not required, IGAs that are not approved by order-in-council would (apparently) be located at the same place in the hierarchy of norms as those that are approved.

¹⁶² Given the uncertainty surrounding the place of cooperation agreements in the hierarchy of norms in Belgium, these constitute additional arguments in support to the thesis that agreements are, by their very character, protected from contrary unilateral action.

¹⁶³ *Supra*, 4.4 and 5.4.

paliatives to non-legally binding IGAs, however. They are conceived as means of preventing a public authority from doing what it is normally authorised to do: legislate or regulate in contradiction of an IGA which can otherwise be legally binding. They are thus tools for tempering with the harshness of a formal hierarchy of norms. The concluding chapter questions the adequacy of the hierarchical (or “pyramidal”) paradigm to federal regimes. At this stage, however, I am still concerned with legal doctrines which – in positive law – have been invoked to better integrate the federal dimension in the classic paradigm of the “pyramid”.

6.3.1 Protecting IGAs from unilateral action in Belgium

We have seen that the case for the supremacy of cooperation agreements over (unilateral) legislation and regulations has been defended in the literature through an analogy with the supremacy of international law over domestic law within the Belgian legal order. We also saw that certain objections could be raised to counter such an analogy. The literature has then also invoked two other legal doctrines to support the assertion that the logic of the institution of IGAs is that they should take priority over unilateral norms: the “parallelism of forms” and “federal loyalty”. In the absence of any contradiction between a unilateral norm and an IGA so far, neither of these doctrines has been tested in court.

6.3.1.1 The doctrine of parallelism of forms

A doctrine that can potentially restrict the powers of the various legislative assemblies or executives to adopt norms that contravene cooperation agreements is known as the “parallelism of forms”. It provides that an administrative act can only supersede a previous one if it is adopted through a similar type of instrument, and with due respect for the same formalities as surrounded the initial act.¹⁶⁴ Consequently, if an act requires the consent of another party, an act purporting to replace it will also formally require that consent. UYTENDAELE has invoked the theory in the context of cooperative agreements to argue that a component of the federation “could never *implicitly* and unilaterally undo what originates in a meeting of wills between itself and several other ones”.¹⁶⁵

It must be underlined, however, that the doctrine of the parallelism of forms normally only applies to the extent that no legislative or regulatory provision specifically provides for formalities concerning the subsequent act.¹⁶⁶ Put another way, a statute or a regulation may

¹⁶⁴ CSAS 82.990 (20.10.1999) (*Versteegen*); CSAS 83.144 (26.20.1999) (*Clareboets* no.1) and 103.011 (26.20.1999) (*Clareboets* no. 2).

¹⁶⁵ UYTENDAELE (2001) 872 (my translation, and my emphasis).

¹⁶⁶ FAVRESSE (1993-94) 144; FLAMME (1989) T.I, 361.

authorise a contrary act that would not follow the procedure used to adopt its predecessor, to the extent that this is done explicitly.

This is the heart of the problem. UYTENDAELE underlines that a subsequent legislative instrument may not *implicitly* revoke a cooperative agreement. He does not address the possibility that a legislative or regulatory instrument could do so *explicitly*. The doctrine of “parallelism of forms” would not appear to preclude an *express* unilateral denunciation of an agreement, or even the adoption of an instrument which would explicitly contradict the content of an earlier one, which was assented to by the same legislative assembly. More significantly, it is not obvious that the doctrine of parallelism of forms – which is an administrative law doctrine aimed at controlling the legality of regulatory instruments and administrative decisions – can or should be transposed to the legislative context.¹⁶⁷

The logic that underlies the doctrine of “parallelism of forms” seems implacable at first: a bilateral or multilateral act may not be offset by a unilateral initiative. In positive law, however, it seems unlikely that it could have the effect of placing IGAs above legislation in the hierarchy of norms. It may have a greater chance of consolidating an IGA against contrary regulations, to the extent that there is no express mention that the regulation contradicts the agreement.

6.3.1.2 The doctrine of federal loyalty

The second doctrine which could be mustered to preclude the unilateral denunciation of an agreement through the adoption of explicitly contrary unilateral instruments is the principle of “federal loyalty”. While it was entrenched in 1993, it is not defined in the Constitution.¹⁶⁸ Parliamentary debates indicate that authors of the reform did not (or could not) give it a precise meaning or specify its legal effect. It is generally understood as a means of avoiding conflicts of a political nature that may arise in the course of the lawful exercise of constitutional powers. The notion implies that in exercising their constitutional powers, the different orders of governments “should not disturb the equilibrium of the whole

¹⁶⁷ CSAS 91.389 (06.12.2000) (*Vrancken*); CSAS 119.737 (22.05.2003) (*Dufour*). In CSAS 18.900 & 18.901 (14.04.1978) (*Barri*), the Council added that the principle does not defeat a regulatory instrument with force of law.

¹⁶⁸ S.143, *Constitution*. On the notion of federal loyalty: VERHOEVEN, Joe, *La loyauté: mélanges offerts à Étienne Cerexhe* (Brussels: Larcier, 1997); LAGASSE (1999) 341; DELPÉRÉE (2000) 657; ERK, Can, GAGNON, Alain-G., “Constitutional Ambiguity and Federal Trust: Codification of Federalism in Canada, Spain and Belgium”, (2000) 10 *RFS* 92-111.

construction".¹⁶⁹ While not actually enforceable, the notion has been used as a principle of interpretation in constitutional cases.¹⁷⁰

The notion of "federal loyalty" finds echo in the obligation of good faith inherent to the civil law of obligations, and was clearly inspired by the principle of *Bundestreue* defined by the German Federal Constitutional Court.¹⁷¹ This principle, of praetorian origin, imposes on other parties the *legal* obligation to consider the interests of other parties, even in the context of the exercise of an exclusive competence. The Constitutional Court has invoked the doctrine of federal loyalty to restrict the freedom of action of executives to act in contradiction with an intergovernmental agreement.¹⁷²

On the other hand, Germany is a dualist system both with regards to the relationship between the domestic and the public international legal order, and apparently, with regards to the relationship between the internal legal order of each component of the federation and agreements between them.¹⁷³ This implies that subsequent contrary legislation should have primacy over previous agreements, as is the case in Canada. While the Constitutional Court has never used the principle to invalidate a law (by opposition to an executive act), it has incidentally noted that legislative assemblies must consider the interests of other members of the federation.¹⁷⁴ Their sovereignty is thus restricted, but in an imprecise manner, by the *Bundestreue*. Put another way, it is unclear that the principle could be used to invalidate a legislative instrument that explicitly derogates from an existing IGA. Federal loyalty is a strong tool of interpretation, it has been used to counter executive action, but its power to alter the hierarchy of norms so as to protect inter-federal agreements against contrary legislative action is not entirely resolved.

¹⁶⁹ "Ne pas porter atteinte à l'équilibre de la construction de l'ensemble": Parl Doc, Senate, SE 1991-1992, 100-29/2, 20.

¹⁷⁰ Hence, in its key ruling on the 2001 constitutional reforms, the Court of Arbitration both asserted its lack of jurisdiction to enforce s.143 and the fact that none of the arguments pursuant to which certain aspects of the reform violated federal loyalty differed in substance from arguments grounded in other provisions. In other words, despite its lack of jurisdiction, it still considered the arguments: CA35/2003, par. 19.3 and 19.9.

¹⁷¹ BLAIR, Philip, CULLEN, Peter, "Federalism, Legalism and Political Reality : the Record of the Federal Constitutional Court", in JEFFERY, Charlie, ed., *Recasting German Federalism : the Legacies of Unification*, (London/New York: Pinter, 1999) 119-154. 133-141. Without formally using the expression "federal loyalty", the 1999 Swiss Constitution provides that public institutions must act in "good faith" and owe each other "respect": ss.5(3) or 44(2).

¹⁷² Although this was in the context of the execution of international obligations contracted by the Bund, but in matters falling within the legislative competence of the Länder. Federal loyalty was thus intimately linked with issues of distribution of competences: SCHAUS (2001) vol. I, 108-114 and 143 ff.; GARCIA MORALES (1998) 157-158.

¹⁷³ Although Germany has been characterised as "[the] most international law-friendly variant of dualism": YOUNG, Katherine "The Implementation of International Law in the Domestic Laws of Germany and Australia: Federal and Parliamentary Comparisons", (1999) 21 *Adel LR* 177-208, 189.

¹⁷⁴ GAUDREAU-DESBIENS, Jean-François, "On Federal Loyalty", 2003, paper on file with author.

Interestingly, the Belgian literature does not underline the potential limits to the reach of *Bundestreue* that flow from the dualist character of the German legal system.¹⁷⁵ Admittedly, these limits are not clear. In other words, there is no equivalent to the *CAP Reference* in Germany, in which the Constitutional Court would have affirmed the supremacy of legislation over IGAs, or vice versa. This being said, it does not appear to be clearly established that the *Bundestreue* has the effect on the hierarchy of norms that Belgian authors wish it has, and wish to see transposed into the Belgian context. The focus is clearly on the “moral” dimension of the principle (good faith, respecting other partners) and on the malleability of the notion, in the hands of judges.

This last aspect is relevant because despite entrenchment in the Belgian Constitution, the principle of federal loyalty is not directly justiciable, in the sense that no direct legal sanction is provided in cases of violations.¹⁷⁶ The Court of Arbitration has invoked it in a number of cases (none of them relating to IGAs). It constitutes a rule of interpretation, but no final ruling has ever rested on the principle. While the doctrine does not clearly translate into concrete and precise obligations, it nevertheless allows for a degree of judiciarisation of the manner in which inter-federal relations must be exercised.

It is unclear how the Court of Arbitration could use “federal loyalty” to actually annul an Act which *explicitly* contradicts a cooperative agreement, or how the administrative section of the Council of State would refer to it to annul a regulation with the same effect.¹⁷⁷ Yet, some judges have privately admitted that they would use the doctrine – one way or another – to preclude one order of government from going back on its word. In brief, one cannot affirm that federal loyalty can alter the hierarchy of norms, placing cooperation agreements above unilateral legislation or regulations. Given the creativity of judges, however, and the dependance on some degree of legal certainty for the very survival of the federation, the principle does have that potential.

6.3.2 Protecting IGAs from unilateral action in Canada

In the *CAP Reference*, provinces and aboriginal groups submitted a number of arguments in their hope to curb unilateral action by the federal government. The case was discussed at length earlier and there is no need to revisit it in detail. The Court dismissed every one of the submissions. In some cases, it did so in a cursory manner, on grounds that they were not properly framed in the original question the Court was asked to answer. But the Court did answer with a certain amount of detail to certain submissions which were not

¹⁷⁵ Dualism is used here in the sense of the co-existence of distinct legal orders.

¹⁷⁶ CSLS 25.093/9, Doc Parl, Ch., SO, 1995-96, 577/1.

¹⁷⁷ Assuming the CSAS has the jurisdiction to use an IGA as a “norm of control”. On this: *supra*, 6.1.1.1.

part of the original question either.¹⁷⁸ This selectivity leaves a strong impression that the Court analysed the argument it could relatively easily have set aside, while it preferred to avoid those which raised more fundamental questions regarding relations between orders of government in a federal regime.

Given the particular fact pattern that gave rise to the *CAP Reference*, and the evolution of the Court's case law over the last ten years, it is nevertheless worth revisiting some of the doctrines the Court set aside. I will consider three: the doctrine of legitimate expectations, constitutional conventions and the "principles of federalism".¹⁷⁹

6.3.2.1 The doctrine of legitimate expectations

In Chapter 4, we saw that the doctrine of legitimate expectations could conceivably be invoked to protect the interests of parties to an IGA that is not formally legally binding. In that context, it is somewhat akin to the doctrine of estoppel in public international law. Similarly, the doctrine was invoked in Chapter 5 as a means of protecting some third party interests when they may have relied on an IGA which in the end cannot be formally characterised as a normative instrument *erga omnes*. In both cases, the doctrine would, at a minimum, impose an obligation of justification on the executive seeking to depart from an IGA, even one that does not cross the threshold of juridicity, whether *inter partes* or *erga omnes*.

In the *CAP Reference*, British Columbia had admitted that the doctrine could not preclude a legislature from legislating. It argued, however, that the executive party to the agreement could not introduce legislation that has the effect of countering an inter-government scheme that had been in place for over a quarter of a century. The fact that the deal had never been modified unilaterally, including the funding formula contained in the federal *Act* and not reproduced in the IGA, had generated a "legitimate expectation" that the arrangement would not be denounced unilaterally.¹⁸⁰ As we saw, the Supreme Court disagreed, holding that the parliamentary system would be "paralysed" if the doctrine were used to prevent the executive from introducing legislation. In this context, restraining the executive amounts to a "a fetter on the sovereignty of Parliament itself".¹⁸¹

¹⁷⁸ The issues of "manner and form" (raised by aboriginal groups) and of the federal legislative competence (raised by Manitoba): *CAP Reference*, 561-567.

¹⁷⁹ The Court also dismissed the "manner and form" argument, holding that the federal *Act* authorising the CAP arrangement did not contain any deliberate limitations on Parliament. "Manner and form" refers to legislative drafting techniques meant to subject subsequent legislation to particular procedures: ELLIOT (1991).

¹⁸⁰ *CAP Reference*, 554.

¹⁸¹ *CAP Reference*, 559.

In the *CAP Reference*, the Court rejected the substantive branch of the legitimate expectations doctrine. It has reiterated that position since.¹⁸² Even in its procedural incarnation, the doctrine of legitimate expectations would not succeed if a government chose to use the legislative assembly for these ends. Given the unambiguous answer rejection of the doctrine by the Court, the doctrine of legitimate expectations cannot have the effect of altering the hierarchy of norms, so as to put IGAs above unilateral legislation.

6.3.2.2 Constitutional conventions

In the *CAP Reference*, Ontario contended that with regards “to cost-sharing agreements a constitutional convention existed that neither Parliament nor the legislatures [would] use their legislative authority unilaterally to alter their obligations”.¹⁸³ The Court replied that the issue of constitutional conventions had not been properly raised and declared rather abruptly, that “[t]he existence of a convention, therefore is irrelevant and need not be considered further”.¹⁸⁴ The Court did not actually deny the existence of such a convention: it simply refused to consider the issue.¹⁸⁵ The possibility that the existence of a convention with the effect of curbing parliamentary sovereignty in the context of IGAs could be revisited in a different context is therefore not entirely excluded.

Conventions are peculiar norms in Canadian constitutional law.¹⁸⁶ These “rules of constitutional ethics and of political morality which impose obligations and indicate how the powers of the State are to be exercised” are not directly enforceable.¹⁸⁷ Courts, however, can recognise their existence, notably in the context of a declaratory judgment or a reference. In the *Patriation Reference* of 1981, the Supreme Court outlined three conditions for the existence of a constitutional convention.¹⁸⁸ There must be precedents for the rule, actors have to believe the rule to be binding, and there has to be a reason for this rule. Conventions can also arise through consent.¹⁸⁹

¹⁸² *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, with perhaps a slight movement in favour by some members of the Court: *Mount Sinai v. Québec*, [2001] 2 SCR 281.

¹⁸³ *CAP Reference*, 561.

¹⁸⁴ *CAP Reference*, 561.

¹⁸⁵ The Court’s reluctance could be explained by the fact that only ten years earlier, it had rendered two controversial decisions involving constitutional conventions that had plunged the country in a major political crisis. Avoiding an issue which was not raised directly may have appeared more prudent: *Re Resolution to Amend the Constitution*, [1981] 1 SCR 753 [*Patriation Reference*] and *Re Objection by Québec to Resolution to Amend the Constitution*, [1982] 2 SCR 793 [*Québec Veto Reference*].

¹⁸⁶ HEARD, Andrew, *Canadian Constitutional Conventions: the Marriage of Law and Politics*, (Toronto: Oxford UP, 1991).

¹⁸⁷ TREMBLAY (2000) 20 (my translation); *Patriation Reference*. Sanctions for their violations are political, or even moral TREMBLAY (2000) 20, fn 74 and 27, fn 118.

¹⁸⁸ *Patriation Reference*, 880-84 endorsing JENNING (1959) 90.

¹⁸⁹ MARSHALL, Geoffrey, *Constitutional Conventions: The Rules and Forms of Political Accountability*, (Oxford: Clarendon Press, 1986) 217 ; POIRIER, *Concordats*, 153-154.

Stability in inter-governmental relations constitutes a good reason for the existence of a convention. Hence, if the issue were to be reconsidered, either the existence of a precedent or of consent not to act in a manner that contradicts an IGA, notably by legislating, would have to be demonstrated. Given that IGAs are very largely respected, the existence of precedent could probably be established. The problem lies with the second condition: that actors must believe the precedent to be binding politically and morally.¹⁹⁰ This condition is the crucial one.¹⁹¹ Federal partners respect IGAs for all sorts of reasons, including political self-interest. Moreover, the impact of the *CAP Reference* has been to propagate the idea that it is legitimate for IGAs to be subject to unilateral repudiation.¹⁹² Establishing that parties feel bound by a rule pretending to prevent them from legislating in contradiction with an IGA would therefore represent a considerable challenge.

Alternatively, it could be argued that in certain cases, federal partners have by consent deliberately adopted a convention not to legislate in contradiction with a particular IGA. In the *CAP Reference*, Ottawa admitted that conventions could arise through certain types of momentous agreements.¹⁹³ It denied, however, that this could be the effect of consent embodied in IGAs dealing with funding measures. Given the general belief concerning the status of IGAs in Canada today, proving the existence of such consent would undeniably require very clear and explicit language.

To contravene a convention is unconstitutional, although the only legal sanction would be a judicial statement that the convention exists and that it has not been respected. No legislative instrument may be declared *ultra vires* for violating a convention. Assuming a convention not to legislate against a particular IGA could be proven, would it actually alter the formal hierarchy of norms? Would it have the effect of placing the IGA above unilateral legislation? In practice, yes. For, conventions are widely respected by Canadian governments.¹⁹⁴ Had the Supreme Court recognised a convention in the *CAP Reference*, there is no doubt that this would have carried immense weight in intergovernmental

¹⁹⁰ WOEHLING, José, "La Cour Suprême et les conventions constitutionnelles: les renvois relatifs au 'rapatriement' de la Constitution canadienne", (1984) 14 *RDUS* 391, 420-425.

¹⁹¹ It was on this ground that the Supreme Court concluded Québec did not have a veto on constitutional amendments that affected its legislative powers in the *Québec Veto Reference*: TREMBLAY (2000) 22.

¹⁹² In fact, as we saw, this belief has even lead to a certain understanding in some circles that IGAs are not legal instruments at all: for ex.: *Ontario (Chicken Producer's Marketing Board) v. Canada (Chicken Marketing Agency)*, [1993] 1 FC 116 (FCTD), par. 27.

¹⁹³ Such as the Imperial Conference through which it was agreed that the UK Parliament would not longer legislate for Canada, later embodied in the Statute of Westminster, 1931: *CAP Reference*, Factum for Canada, par. 73 (on file with author).

¹⁹⁴ The federal government complied with the finding of a convention that prior to 1982, amending the Constitution required a substantial degree of provincial consent, and sought this provincial support (*Patriation Reference*). Had the Court found a similar convention regarding Québec, it is likely that Ottawa would not have "patriated" the Constitution without the latter's agreement, as it did in 1982 (*Québec Veto Reference*).

negotiations and it might very well have been decisive. In “hard” positive law, however, the answer is “no”. For a court could not invalidate a federal or provincial Act that contradicted or repudiated the IGA subject to a convention.

6.3.2.3 The “unwritten” principle of federalism

In the *CAP Reference*, Manitoba submitted that an “overriding principle of federalism” precluded unilateral federal legislative action.¹⁹⁵ The argument went as follows. One they have decided to fund programmes which fall within the exclusive jurisdiction of provinces, federal authorities may not unilaterally revoke their support without provincial consent because of the disruption caused in this sphere of exclusive provincial competences. The Court rejected this argument in a summary fashion, noting that it could not control the use of the spending power. It refused to delve any further into the role which “federal principles” may have played in the matter.¹⁹⁶ Again, this summary dismissal by the Supreme Court in the *CAP Reference* does not imply that it would never find such principles of federalism in other contexts.

In fact, the unwritten “principle of federalism” played a prominent role in the *Secession Reference* rendered in 1998, although it was not clearly defined.¹⁹⁷ In that advisory opinion, the Supreme Court held that an Act of the Quebec National Assembly purporting to effect secession from Canada would be unconstitutional. Three main interrelated principles were said to prevent this unilateral action: democracy, constitutionalism/rule of law and federalism. This is possibly the first time that the Supreme Court has recognised that federal principles (as opposed to distribution of powers or Charter rights) could curb Westminster style parliamentary sovereignty.

Interestingly, parliamentary sovereignty does not figure amongst the fundamental unwritten principles of the Canadian constitution identified by the Court. In fact, the same year as the *Secession Reference* (1998) the Court affirmed that parliamentary sovereignty is not an end in itself, but a means to citizen participation, and thus to democracy.¹⁹⁸ The following year, in *Wells*, the Supreme Court attempted to harness the freedom of action of the executive, even when the latter is using the legislative assembly to obtain what it

¹⁹⁵ *CAP Reference*, 567.

¹⁹⁶ *CAP Reference*, 565.

¹⁹⁷ *Re the Secession of Québec*, [1998] 2 SCR 217 [the *Secession Reference*], par. 55-60.

¹⁹⁸ *Vriend v. Alberta*, [1998] 1 SCR 493, par. 174, citing with approval BLACK, William, “*Vriend*, Rights and Democracy”, (1996) 7 *Constitutional Forum* 126 at 128. *Vriend* was a “Charter case”, but the tempering with the sovereignty of the Alberta legislature was patent since the Supreme Court read-in a prohibited ground of discrimination that the Alberta legislature had deliberately left out. In other words, the court did not invalidate an Act, it completed it, despite the wishes of the elected representatives.

wants.¹⁹⁹ Are we witnessing a new - more flexible, more teleological - interpretation of parliamentary sovereignty than the one offered in the *CAP Reference*?

It is worth noting that in the *Secession Reference*, the Supreme Court also recognised that federalism (as well as constitutionalism and democracy) may in some circumstances give rise to a legal duty to negotiate, even in the absence of a legal sanction for failing to do so.²⁰⁰ By analogy, could one argue that the federalism principle can create a legal duty not to unilaterally denounce an IGA to which one is party, even if there are no legal sanctions for failing to do so?²⁰¹

Appeal to the principles of federalism in this context could be compounded with arguments founded on the “unwritten” principle of the rule of law. In fact, in a biting criticism of the use of legislative assemblies by governments who seek to avoid their contractual responsibilities, MONAHAN, argued that the rule of law may act as a proper limit on parliamentary sovereignty in the context of a unilateral repudiation of a contract by a government.²⁰²

On the other hand, however, if the “principle of federalism” could be read as a damper on parliamentary sovereignty, the unwritten principle of democracy may come to the rescue of the supremacy of the legislative branch. After all, citizens, and their representatives, are entitled to change their minds.²⁰³ The question is if they can do so with impunity when their actions affect other components of the federation. Put another way, the three unwritten principles grounding the Canadian constitution would have to be balanced against one another were the case for the protection of IGAs in general (or of a particular one) to be made again.

GAUDREAU-DESBIENS has noted the lack of normative conception of federalism in Canada.²⁰⁴ It is true that the very expression “principles of federalism” remains ambiguous. *A priori*, it would seem to find an echo in the principle of “federal loyalty” examined in the Belgian context.²⁰⁵ However, while the latter refers to good faith, in the Canadian context, “federalism” has generally been understood as the protection for the

¹⁹⁹ *Supra*, 6.2.2.2.

²⁰⁰ The *Secession Reference*, par. 97-102.

²⁰¹ This would be different from a convention, since this would not require a demonstration that the parties felt bound by the rule.

²⁰² Patrick MONAHAN argues that the rule of law may act as a proper limit on parliamentary sovereignty in this context: “Is the Pearson Airport legislation unconstitutional?: The rule of law as a limit on contract repudiation by government”, (1995) 33 *Osgoode HLJ* 411-452.

²⁰³ MOORE (1935) 184; LAJOIE (1984) 165.

²⁰⁴ GAUDREAU-DESBIENS, “The Canadian Federal Experiment, or Legalism without Federalism? Towards a Legal Theory of Federalism”, forthcoming [GAUDREAU-DESBIENS, *Normative*].

²⁰⁵ On the principle of federalism: TREMBLAY (2000) 23.

federal structure of the country, rather than as a reference to the spirit which should inhabit it. The focus has largely been on the imperative of the protection of the autonomy of federated entities. While this is open to debate, the “principle of federalism” invoked by the Supreme Court in the *Secession Reference* was much closer to this traditional reading.

The closest equivalent to the principle of federal loyalty in the Canadian context may be the principle of federal “comity” (“courtoisie”). Only a few months before the *CAP Reference*, the Court had found that rules of “comity” between provinces went beyond those applicable between states in international law.²⁰⁶ There should logically be some connections between these enhanced rules of comity and principles of federalism, which the Supreme Court conveniently avoided in its discussion in the *CAP Reference*.²⁰⁷

More recently, in the *Colour of Margarine* case,²⁰⁸ the Superior Court of Québec rejected an argument that Québec’s refusal to abrogate a regulation violated the “spirit of federalism”. The Court actually focused on the federal structure of the country, insisting on provincial competences in the matter. To the extent that regulations do not discriminate between a local enterprise and an out-of-province one, there is no violation of federalism. The Court admitted the tension between the search for an economic union and the “balkanisation” of such measures, but did not find them contrary to Canadian federalism.²⁰⁹ It never approached the question from the angle of “federal loyalty”, but rather concentrated on a classic positivist reading of Canadian constitutional law.

The distinction between the concepts of federal loyalty, as understood in Belgium, and the dominant principle of federalism in Canada reflects a distinct emphasis given to the values of cooperation and of democracy in the two federal regimes. Fundamental principles have given rise to an industry of academic writing over the last few years.²¹⁰ While the Supreme Court’s case law shows greater finesse than was evidenced in the *CAP Reference*,

²⁰⁶ *Morguard Investments Ltd. v. De Savoye*, [1990] 3 SCR 1077; *Hunt v. T&N PLC*, [1993] 4 SCR 289.

²⁰⁷ Recently, the Québec Court of Appeal denied that imposing higher University fees for out of province students violated rules of “comity” (“courtoisie”): *Ruel v. Marois* (CAQ) (500-09-006303-986) 30.10.2001 (REJB 2001-27081).

²⁰⁸ The *Colour of Margarine* case: *supra*, 5.2.2.3 and 6.2.3.

²⁰⁹ Citing *Egg Marketing Commission v. Richardson*, [1998] 3 SCR 157, 237 (structure of the Canadian constitution represents a historical compromise between local interests and the visions of an economic union).

²¹⁰ COUSINEAU, Marc, “L’Affaire Montfort: confirmation de la valeur des principes fondamentaux de la Constitution”, (2002) 13 *NJCL* 485-511; OLIVER, Peter, “Canada’s Two Solitudes: Constitutional and International Law in Reference re Secession of Québec” (1999) *Int’l Journal of Minority and Group Rights* 65-95; CAMERON, Jamie, “The written word and the Constitution’s vital unstated assumptions” in THIBAUT, Pierre, PELLETIER, Benoît, PERRET, Louis, *Les Mélanges Gérald-A Beaudoin: Les défis du constitutionnalisme* (Cowansville: Yvon Blais, 2002) 89-113; NEWMAN, Warren, “Réflexions sur la portée véritable des principes constitutionnels dans l’interprétation et l’application de la Constitution du Canada” (2001) 13 *NJCL* 117-164.

it is still too early to see whether the classic principle of federalism is moving closer to the principle of *Bundestreue*, or at least incorporating, a conception of good faith, which could temper with “hard” powers to legislate for instance.²¹¹

Would the Supreme Court (re)consider the impact of unwritten constitutional principles, and primarily the principle of federalism, in the context of a dispute relating to an IGA? Its case law has evolved significantly along those lines since 1991. It may be that the *CAP Reference* simply came at the wrong time, and with bad facts. A battle about money between federal authorities and the three richest provinces may not have been the best context in which to argue that parliamentary sovereignty ought to be somewhat curbed in recognition of the cooperative nature of the Canadian federal regime.²¹²

It bears pointing out that unlike constitutional conventions, and the principle of federal loyalty in Belgium, unwritten constitutional principles are apparently enforceable in Canada. That is, an Act contravening one of these principles could apparently be invalidated by a Canadian court.²¹³ In theory, therefore, the principle of federalism could potentially alter the respective places occupied by IGAs and unilateral legislation in the hierarchy of norms. At this stage, this possibility is not totally *de lege ferenda*, but it is *de lege incognita*.

Conclusions

Public law in both Canada and Belgium rests on a hierarchical paradigm. The Constitution sits at the apex, with legislative instruments on the rung just below, followed by regulations. The legality of norms, and of administrative action, is premised on this pyramidal configuration. Inserting negotiated instruments in this structure poses a challenge, which leaves a number of unresolved questions and controversies in both federations.

In Belgium, there is no doubt that cooperation agreements are subordinate to constitutional norms. This implies that they cannot violate fundamental rights, but, more relevant for our purposes, that they cannot be used to circumvent the formal distribution of competences that is provided by quasi-constitutional legislation. Canadian executives cannot use IGAs to curb fundamental rights either. However, the Supreme Court of Canada's tolerance for the spending power, of which IGAs are a prime channel, raises doubts as to the subordination of IGAs to the formal distribution of competences, even in *positive* law.

²¹¹ GAUDREAU-DESBIENS wonders whether federal loyalty does not actually stem from the very nature of federalism and therefore should underlie any federal structure: (*Normative*, 34)

²¹² An “unwritten” principle cannot override an explicit text but could arguably alter the interpretation of another unwritten structural principle: *Hogan*, 275.

²¹³ COUSINEAU (2002) 492-496.

In brief, the subordination of IGAs to constitutional norms is clearly established in Belgium, even if respect for this ordering occasionally leads to creative constitutional interpretation. Canadian courts show less concern for this hierarchy, and the subordination of IGAs to the Constitution, which should go without saying, cannot be asserted with the same degree of certainty.

The Canadian position is far less ambiguous regarding the respective places of IGAs and legislation. In the 1991 *CAP Reference*, the Supreme Court of Canada provided a classic reading of the doctrine of parliamentary sovereignty, which enables federal and provincial assemblies to legislate in contradiction to an IGA, or even to withdraw a statutory incorporation that gave a particular IGA the normative force of a statute. As was noted above, notable judicial and doctrinal interest has developed concerning unwritten constitutional principles, including the “principle of federalism”. Whether and how this could affect the classic understanding of parliamentary sovereignty in the context of inter-federal relations is unclear. At this juncture, the subordination of IGAs to unilateral legislation seems undeniable in Canadian public law.

By contrast, the issue of the respective positions of IGAs and “ordinary” legislative instruments remains partly unresolved in Belgium. Agreements that do not receive legislative assent are clearly subordinate to legislation. If this assent is not required, the agreement cannot pretend to have the force of statute. If such assent is required, but has not (yet) been granted, the IGA is simply without any legal effect. Either way, such IGAs cannot compete with statutes in the battle for formal normativity in positive law. The main controversy thus relates to IGAs that have received proper legislative approval and contrary unilateral legislative instruments.

In the absence of any clarification by the special legislator, or of any case law, some analysts simply refuse to make a prognostic. Others vigorously argue that the “logic” or the “spirit” of s.92*bis* implies that when federal partners conclude a deal, they cannot denounce it unilaterally. Parallels are drawn with the supremacy of directly applicable international law in the domestic legal order, and appeals are made to doctrines of “parallelism of forms” and “federal loyalty” in support of this position. The underlying value of democracy which grounds the Canadian position that legislatures should always be entitled to “change their mind”, is simply never invoked. Given the political earthquake unilateral action taken in contradiction of an agreement would cause in this relatively unstable federation, it is likely that judicial institutions would muster every argument to consolidate the supremacy of negotiated norms over unilateral ones. At this stage, the issue is still unresolved, however.

Assuming IGAs could be re-characterised as regulatory instruments in Belgium,²¹⁴ this debate is simply transposed to the next rung of the hierarchy. Some authors maintain that IGAs that do not require legislative assent are nevertheless protected against contrary unilateral contrary regulations. The foundation is, again, largely ideological, and given the lack of case law directly on this issue, the place of these IGAs and of other regulatory instruments in the hierarchy of norms is also uncertain.

Even if IGAs could be recast as regulatory instruments in Canada, any suggestion that they would thereby supplant “ordinary” regulations is very unlikely to succeed. Courts are very tolerant of cooperative schemes, and there is little doubt that IGAs govern the behaviour of public officials. Yet, when the respective normative force of IGAs and of unilateral norms is raised directly, the latter tend to hold sway.²¹⁵

A number of doctrines and principles canvassed in this section have been invoked either in the literature (in Belgium) or in courts (in Canada) as means of softening the hard edge of the autonomy recognised to federal partners to renege on their word. The underlying principle common to the “parallelism of forms”, legitimate expectations, constitutional conventions, federal loyalty and principles of federalism is that federal partners should keep their promises to one another, and the representation they jointly make to their populations, and that this can imply legal limits to their autonomy.

None of these doctrines has yet succeeded to alter or consolidate IGAs in the hierarchy of norms, so as to protect them from unilateral action. They simply have not had the opportunity in Belgium, where no contradiction between cooperation agreements and unilateral norms has reached the courts. Some of these were ardently argued in the *CAP Reference* in 1991, but not given serious consideration by the Supreme Court of Canada. Given recent jurisprudential evolution, a more nuanced reading could potentially be provided, so that the balance between parliamentary sovereignty and the stability of inter-federal relations could be revisited.

At this stage, however, IGAs are officially subordinate to just about every norm of positive law in Canada except, perhaps (and astoundingly) to some parts of the Constitution.²¹⁶ Their place in the hierarchy is uncertain in Belgium, despite recurring appeals to the supremacy of negotiated instruments over classic unilateral legal norms.

²¹⁴ *Supra*, 5.3.1.

²¹⁵ Although as we saw, the case law is not consistent on this matter: *supra*, 5.3.2, 6.2.3 and 6.2.4.

²¹⁶ Particularly given judicial tolerance to their use as instruments of the spending power: *supra*, 4.1.2.2.

In the meantime, the best way of guaranteeing IGAs in both federations a higher place in the hierarchy of norms, would be to do so explicitly. In Belgium, this would imply an amendment to section 92*bis* of the 1980 DMA, or even better, to the Constitution. In Canada, this could be accomplished through certain legislative techniques,²¹⁷ although the most effective way would be to “constitutionalise” IGAs. Since the permanency of the 19th century “constitutionalised” agreements is problematic, several suggestions have been made to allow for “à la carte” constitutionalisation with a sun-set clause.²¹⁸ That is, for a period of say five years, an IGA adopted through a procedure that would be outlined in the Constitution, would gain supra-legislative status. This would provide a temporary alteration of the hierarchy of norms, which may offer the best compromise between stability in inter-federal relations, and democracy.²¹⁹

²¹⁷ Mostly “manner and form” limitations, which allow a legislature to bind itself as to procedure, rather than content. Of course, these limitations can be revoked through legislation, but only following the agreed upon procedure. For instance: *Maritime Economic Cooperation Act*, RSNB, ch. M-1.11, ss.7-9, pursuant to which the “province agrees not to adopt measures that are contrary to the purpose, principles and strategic goals of this Act” and stating that “it is the declared intention that this Act [...] shall remain in force until repealed by one or more of the legislatures of the Maritime Provinces and a legislature intending to repeal this act [...] shall give at least one year’s notice [...]”. In the *CAP Reference*, the Supreme Court rejected the manner and form argument, not in principle, but on the facts of the case.

²¹⁸ This was part of the constitutional reforms proposed in the Charlottetown Accord, s. 126: PELLETIER, Benoît, “Le partage constitutionnel des pouvoirs, selon l’entente de Charlottetown” in *Référendum 26 octobre 1992: Les objections de 20 spécialistes aux offres fédérales* (Montréal: Éditions Saint-Martin, 1992) 77-85, 78; HOGG, Peter W., “Division of Powers in the Charlottetown Accord” in McROBERTS, Kenneth, MONAHAN, Patrick, (eds.), *The Charlottetown Accord, the Referendum and the Future of Canada* (Toronto-Buffalo-London: U of T Press, 1992) 85-92, 88-90; FRIEDLANDER (1993).

²¹⁹ It must be pointed out, however, that such “temporary entrenchment” would not resolve the uncertainty concerning the subordination of IGAs to the formal distribution of competences: *supra*, 6.2.1.1 and 6.2.6.

CONCLUSIONS TO PART II

As noted in the Introduction, my original hypothesis was that despite a convergence of functions played by intergovernmental agreements, their legal status varied greatly in different federal regimes. Belgium and Canada were chosen as case studies to illustrate a federation in which IGAs are primarily conceived as legal instruments and one in which they are understood as essentially political arrangements. While the convergence of functions is clear enough, I have argued that – as is often the case – such dichotomous thinking does not stand up to reality. In truth, IGAs enjoy a spectrum of legal status in both federations.

The attempt to capture the status of IGAs in Belgian and Canadian positive law has revealed two major differences. The first, and most obvious, lies in the existence of an explicit legislative framework concerning cooperation agreements in Belgium. S.92*bis* was added to the main quasi-constitutional statute governing the distribution of competences in the course of the third round of the “federalisation process” in 1988-89.¹ The institutionalisation of cooperative techniques even preceded the official designation of Belgium as a federation in 1993. This is consistent with the legicentrist tradition in Belgium. Institutions that may remain entirely in the sphere of politics elsewhere tend to be “legislated” into life in this complex federal regime.²

By contrast, over the years, Canadian governments have concluded hundreds of IGAs in the near absence of any legislative framework.³ The practice is both rich and haphazard and subject to very few explicit legal rules. The one exception is the historical phenomenon of “constitutionalised agreements”, concluded as new provinces joined the federation, or to alter their status, and which are now constitutionally entrenched.⁴

The second major difference lies in the distinct dominant conceptions of the instrument. In Canada, IGAs are envisaged as a peculiar class of contracts to which both parties are public authorities, with similar privileges and bound by similar public law constraints. Paradoxically, given the traditional lack of distinction between private and public law contracts in common law systems, the implication has been that unless IGAs can somehow be assimilated to private arrangements, they are likely to remain on the “purely” political side of the threshold, at least according to conventional wisdom. While hardly any Canadian case law deals with the matter of the status of IGAs *per se*, there is enough indirect acknowledgement of their normative force to suggest that unless government parties

¹ Similar authorisations are found in the 1989 DMA on Brussels and the 1983 OC concerning the GC.

² On legicentrism: *supra*, 1.1.4.3.

³ Apart from provisions concerning the authority of specific Ministers to conclude them: *supra*, 4.1.2.1.

⁴ And even, then, their status *erga omnes* is not entirely clear: *supra*, 5.1.1.

themselves argue their lack of binding character, courts tend to treat them as binding instruments. But this is not always the case and some recent *dicta* suggest a growing underlying discomfort with this contractual conception, although no alternative is provided apart from their description as significant political instruments or “policy statements”. In other words, courts may be uncomfortable with the contractual status, but do not really abandon the threshold paradigm. They just hesitate to allow IGAs to cross it.

By contrast, in Belgium, the focus is essentially on the normative character of IGAs. They are seen as a means for orders of government of acting together and even as means of jointly adopting norms that become “directly applicable” in their respective legal orders. Cooperation agreements are thus understood as a new – if elusive – type of concerted norm *erga omnes*. This being said, the consensual origins of the institution are undeniable. Moreover the creation, by statute, of special cooperation tribunals charged exclusively with the interpretation and implementation of IGAs, and only open to government parties, also signals a contractual dimension. The fact that no dispute has yet been submitted to these *ad hoc* institutions may explain the limited interest in the characterisation of IGAs as contractual instruments.⁵

Consequently, despite these different conceptions, IGAs gain from being examined as both contractual and normative instruments in both systems. This exercise reveals a number of similarities and differences in terms of the status of IGAs.

While there is a greater presumption of legal character in Belgium, which notably arises from the existence of a specific legislative framework, the characterisation of IGAs as contractual instruments must pass a two-stage test in both federations. First, a number of “public law impediments” to their legal character, germane to each system, must be taken into consideration. Those include issues of capacity/authority to conclude, eventually the parliamentary approval for the spending of public funds as well as a number of *ratione materiae* limitations. Hence neither in Canada nor in Belgium can governments conclude agreements to exchange or cede constitutional competences, or to legislate in a particular manner. In Canada, the rule precluding executives from fettering their “discretion” with regards to governmental functions may constitute such an impediment, although it has not been applied consistently. In Belgium, IGAs may not allow an intrusion by one order of government into the sphere of competence of another. This officially precludes the conclusion of binding IGAs as instruments of the spending power.

The second stage implies the analysis of the IGA through a series of “indicia of legal status”. These include such matters as content, form, wording, formalities, behaviour and

⁵ *Supra*, 4.2.2.2.

provisions for dispute resolution. For a number of reasons, form is a weaker indicator of legal character in Canada, than in Belgium. This implies IGA with a low normative content (framework agreement, hortatory languages, etc.) could cross the threshold of juridicity in Belgium, and not in Canada. The actual normative force of such an IGA *inter partes* would not differ greatly between the two situations, and a Belgian cooperation tribunal may find it difficult to find a violation of such an agreement, even if it is formally characterised as legally binding.

Fundamentally, it is suggested that the rule concerning the normative character *erga omnes* of IGAs is the same in Belgium and in Canada. In neither federation can governments legislate by contract. They can only bind third parties if they obtain the concurrence of the legislative assemblies. The major difference in this context lies in the manner and mostly in the frequency with which this transformation of a consensual instrument into a formally normative one takes place. While the majority of IGAs receive proper parliamentary approval in Belgium, statutory incorporation is a very rare occurrence in Canada. Consequently, the vast majority of the dozens of IGAs concluded each year in Canada are officially devoid of any legal force *erga omnes*. From this perspective, the legal character of IGAs is clearly better established in Belgium than in Canada.

The general presumption that IGAs constitute legal instruments, has also led to a suggestion that IGAs which do not receive legislative assent must nonetheless be understood as regulatory instruments. This conclusion is subject, however, to two caveats. First, this can only relate to IGAs that do not require legislative assent pursuant to s.92*bis*. Otherwise rules of public law meant to ensure parliamentary scrutiny over executive action would be violated. Secondly, the mere description of an agreement as a “cooperation agreement” with reference to s.92*bis* in its preamble does not automatically give it regulatory force. This also requires a process of characterisation *in concreto*, using administrative law criteria for the determination of the regulatory character of instruments which are not formally regulations, such as directives or circulars.

The potential characterisation of IGAs as regulatory instruments could be compelling even in Canada, since so few IGAs are ever formally incorporated, and therefore officially constitute normative instruments *erga omnes*. While Canadian courts have recharacterised certain unilateral “informal” instruments, such as directives, this has not been applied to IGAs. Officially, in Canada, law-making can only be unilateral. There is no equivalent to s.92*bis* to act as a stepping-stone for challenging this dominant conception.

Agreements that do not cross the threshold of juridicity either *inter partes* or *erga omnes*, may nevertheless be given some form of legal effect, through doctrines such as

legitimate expectations or the principle of “*bonne administration*”. In some circumstances, the legal system may provide legal protection to governments or third parties who reasonably relied on a government’s given word, even if that word is contained in a text that is ultimately deprived of actual legal force

Finally, the status of IGAs was also explored from the perspective of their place in the hierarchy of norms. In positive law, there is no question that Belgian cooperation agreements must respect the formal distribution of competences. Officially, they cannot be used as channels for intruding in the sphere of competence of another order of government, including as instruments of the spending power. There are derogations in practice, but the official discourse is clear. By contrast, Canadian courts have shown deference for the use of IGAs as means for conditionally channelling funds from one order of government to another. Consequently, one cannot assert with certainty that IGAs are subordinated to every part of the Constitution. This is particularly paradoxical since IGAs are considered subordinate to just about every other unilateral norm of public law in Canada, and notably to statutes. In the absence of case law, the question is unresolved. However, vigorous, if not always compelling, arguments have been raised to suggest that IGAs which have received legislative assent should be located above unilateral instruments in the hierarchy of norms in Belgium.

Again, a number of legal doctrines can be canvassed for their potential impact on the official hierarchy of norms. Here, the object is not to provide protection when a government disregards an IGA that is formally devoid of legal character, but to preclude unilateral action that counters an IGA even when its status at law is well established. While no Belgian case law has yet used federal loyalty or the “parallelism of forms” to preclude unilateral action that counters negotiated instruments (the issue has not yet arisen), these doctrines have been forcefully invoked by constitutionalists to consolidate the superiority of IGAs over unilateral law making. In Canada, by contrast, the Supreme Court has clearly asserted the precedence of legislation over IGAs, and has dismissed without much consideration arguments that would have curbed parliamentary sovereignty for the sake of stable intergovernmental relations. Whether renewed interest in the unwritten principle of federalism could alter this strict adherence to unilateral action by elected officials remains unclear.

To summarise, IGAs do enjoy distinct legal status in the Belgian and Canadian federal regimes. This does not translate into a sharp dichotomy, however. It is largely a matter of gradation which reflect distinct concerns and conceptual frameworks. These are addressed in the final conclusions.

GENERAL CONCLUSIONS

1. A summary of findings

IGAs are an integral part of the federal phenomenon. Federal regimes rest on a distribution of competences between a number of actors. In many cases, effective public policy requires some form of coordinated action to offset this fragmentation of responsibilities. Cooperation in general, and intergovernmental agreements in particular, work as a sort of counter-balance to the autonomy of federal partners. In this regard, the present thesis started with an intuition and a puzzle. It appeared that, in practice, IGAs played a number of similar functions in most federal systems. Despite this apparent convergence of roles, IGAs seemed to be primarily understood as legal instruments, binding on signatories and on third parties in certain federations, while in others, they appeared to be conceived as political “gentlemen’s agreements” with limited or no legal value and protection. I wanted to verify whether IGAs effectively fulfil analogous functions in different federations and to test the validity of this apparent dichotomy in legal status. To test this two-pronged hypothesis I examined the roles and status of IGAs in the Belgian and Canadian federations.¹

It does appear that - with necessary adaptations dictated by particular economic, political and legal situations - IGAs do indeed play similar functions in different federal systems.² Those can be divided into two main – non mutually exclusive - categories. Explicit functions are those which basically correspond to the content of the agreement. Hence, federal partners make use of IGAs to articulate the exercise of exclusive but closely connected competences, or to sort out respective responsibilities in the case of shared or concurrent ones. IGAs serve to pool resources, and extend services to the population of respective legal orders. In addition to this “substantive collaboration”, IGAs also frequently serve as tools of “procedural cooperation”: they indicate how partners ought to share information, consult, meet, and resolve disputes. IGAs are also used to found joint organisations, endowed or not with legal personality and regulatory authority.

Apart from these explicit functions, IGAs also play a number of implicit, and sometimes even insidious roles. Useful instruments of constitutional engineering, they are used to circumvent an ineffective or inopportune distribution of powers, to blur constitutional boundaries, to complete constitutional reforms, avoid them, or affect reform outside the

¹ Reasons for selecting these examples are outlined in the General Introduction.

² *Supra*, Chapter 3.

regular channels. IGAs - as other forms of contractual arrangements - rest on a theory of equality of partners. In reality – again as other forms of contract - they can represent devices for the articulation of power relations. Regardless of their actual status under positive law, IGAs can induce weaker parties to make concessions, in exchange for resources for instance, which they would not consent to were they in a position of effective, and not merely theoretical, equality. In this last case, IGAs end up as instruments of “regulating by contract”, even when one government does not have the legal means of imposing its will on another.

Despite variations in degree, explained by historical factors, fiscal arrangements, or the distribution of competences, the first branch of my hypothesis was largely confirmed by the theoretical and empirical research undertaken: IGAs do play a number of analogous functions in the Belgian and the Canadian federal systems.

The fate of the second branch of the hypothesis was more complex. The initial task was to unpack three different facets of the “legal status” of IGAs, which are often conflated. Part II of the thesis thus successively examined IGAs as “contractual instruments”, potentially binding on the governments who conclude them (Chapter 4) as well as “normative instruments”, source of law of general application (Chapter 5). It then explored the relative force of IGAs with regards to more classic norms of public law, that is, their place in the hierarchy of norms (Chapter 6).

With regards to the first angle, the distinction between federations which allow legally binding status for IGAs and those which do not, is not as straightforward as I originally thought. There exists, in both types of federal regimes, a spectrum of status, from those which create undeniable legally-binding obligations, to those which clearly do not. The distinction between the legal status of IGAs as contractual instruments in the two federations is more a matter of contrary presumptions than of a clear-cut dichotomy in legal characterisation.

In Belgium, there is a widespread belief that agreements between orders of government are legal instruments. Upon closer analysis, I suggested that this conception amounted to a rebuttable presumption. In Canada, by contrast, many believe that IGAs are of political character, at least until proven otherwise. In both cases, the determination of an IGA's status *inter partes* implies a two-stage exercise of characterisation.³ In Belgium, the process arguably serves to rebut or confirm the presumption of legal character, while in Canada it arguably serves to overturn or validate the presumption concerning the lack of legal force *inter partes*. While there may be a greater predilection for characterising IGAs as

³ *Supra*, Chapter 4.

legal instruments in Belgium than in Canada, the distinction is not as stark as the discourse surrounding them would suggest.

The legal status of IGAs must also be apprehended from the effect they can have in the legal order of each signatory, that is, as a source of law *erga omnes*. The second angle of approach to the status of IGAs revealed a similar fundamental rule of public law: officially, executives cannot alter their respective legal orders, and thus impose obligations on third parties, without the proper concurrence of the legislative branch.

In Belgium, this implies obtaining legislative assent. In Canada, formal statutory incorporation is required. Once these procedural formalities have been met, IGAs have, at a minimum, the force of statute within each legal order. About two-thirds of cooperation agreements receive the required parliamentary approval in Belgium, while formal incorporation of IGAs is extremely rare in Canada. This implies that the vast majority of Canadian IGAs are devoid of any legal force *erga omnes*, although it appears that in some cases they have some sort of normative force, particularly in complex intergovernmental schemes where they are intertwined with a number of unilateral instruments. This suggests that a potential recasting of IGAs as regulatory instruments – possibly along the lines of the recharacterisation of directives as legal instruments - should be investigated.⁴

Assuming IGAs do not cross the threshold of juridicity either as contractual or as normative instruments, the legal system has not yet exhausted its potential reach. In both federations, a number of legal doctrines could be canvassed to assess whether agreements which are formally devoid of legal character *inter partes* or *erga omnes*, may nevertheless have some legal effect. These include a number of interrelated doctrines, such as estoppel, detrimental reliance, legitimate expectations or the principle of “*bonne administration*”. They are all grounded on the principle of good faith and on the belief that at a minimum, public authorities must provide some rational explanation for departing from a given promise or practice. Hence, even when IGAs remain on the “non-legal” side of the threshold, the law may still offer a degree of protection.⁵

Both the status of IGAs *inter partes* and *erga omnes* raise questions concerning the place which IGAs occupy in the hierarchy of norms in federal regimes. Do IGAs enjoy supra-legislative status, which would protect them from unilateral repudiation by one of the parties through a legislative process? This solution - inspired by the German and Swiss experience - is strongly advocated by a segment of the Belgian doctrine. It departs sharply from the solution of federal systems steeped in the English tradition of parliamentary

⁴ *Supra*, 5.3.

⁵ *Supra*, 4.4 and 5.4.

sovereignty. In Canada, legislatures can always adopt statutes which contradict IGAs, even those that otherwise crossed the threshold of juridicity *inter partes*, or were previously incorporated and thus had the force of statute. Here, the difference between the two federations is not merely a matter of presumption. It is a difference of political philosophy with obvious consequences in positive law.

In brief, the answer to the second branch of the hypothesis pursuant to which intergovernmental agreements were understood to be legal instruments in Belgium, while they were primarily conceived as political instruments in Canada, raised three sub-questions. The first relates to their status *inter partes*. Research revealed that the difference between the two federations is more one of degree than of kind. The second regards their status *erga omnes*. Here, the distinction is more significant, and a far greater segment of Belgian IGAs are formal normative instruments than is the case in Canada. The third is the protection of IGAs against contrary unilateral action, particularly legislation. Here, the answer is that they are more clearly subordinated to constitutional norms in Belgium than in Canada, and clearly subordinated to unilateral legislation in Canada, while this question remains open in Belgium.

These differences in legal status reflect different concerns in the two federal regimes. In Canada, cooperation in general, and IGAs in particular, have developed in a pragmatic, haphazard fashion. Given the high degree of effectiveness *inter partes* (to which I return below), IGAs have hardly been “theorised” and courts have had very little opportunity to rule on their status. There seems to be a growing discomfort, however, with the limited contractual conception of the instrument, in view of their impact on third parties. The inadequacy of the dual judicial system to deal with that aspect of the practice of IGAs is patent.

Concerns regarding cooperation agreements were different in Belgium. Given the acrimony that gave rise to the federalisation movement, and the fragmentation of a highly developed welfare State in a short period of time, constitutional architects sought to formalise cooperative techniques. It was feared that those would likely not arise “spontaneously”, or would take too much time to develop, which could create havoc in the management of public affairs. Moreover, a strict interpretation of the distribution of competences effected on an exclusive basis precluded a number of cooperation solutions, or rendered them particularly complicated (as they are in Canada, in fact). The specific legislative regime applicable to cooperation agreements, introduced in 1988-89, was meant as a response to these obstacles.

There is an inherent tension between two fundamental values in countries that are both democratic and federal.⁶ In Canada, emphasis has been placed on the possibility for every member of the federation of “changing its mind” to reflect alterations in the elected officials’ understanding of the public interest they are meant to defend. In Belgium, for a number of historical reasons, greater emphasis is placed on the virtue of collaboration. In this complex society, and now complex federal regime, democracy has always been mediated through negotiated solutions.⁷ Public interest is not understood as being better protected by allowing elected officials to change their minds, without restrictions flowing from previous undertakings.

In other words, in the hierarchy of values – rather than norms – Belgian constitutionalists put cooperation above or on a par with democratic freedom, while their Canadian counterparts have traditionally placed the latter above cooperation. It is arguable that with time, a more sophisticated approach could result from the balancing of “unwritten” constitutional principles, which includes the rule of law and federalism. For the time being, the dominant conception of federalism that emerges from the Canadian approach is of parallel legal orders, equally armed with parliamentary sovereignty. They collaborate for reasons of interest, not because of any normative imperative inherent to the federal edifice and understood as a legal constraint. The Belgian federal construction has made a better effort at integrating those various principles and values, even if gaps in theory, as well as transgressions in practice, remain.

2. Shifting paradigms?

In the General Introduction, I explained that this thesis was mainly an exercise in comparative positive law, although one informed by the theory of legal cultures. From the foregoing, it should be obvious that the positive law of both federations can hardly account for the actual impact of IGAs in federal governance. To begin with, a number of technical issues are unresolved. Does the fettering rule actually preclude the binding character of IGAs *inter partes* in Canada as a matter of principle? Are cooperation agreements which have received legislative assent necessarily placed on a “superior” echelon in the hierarchy of norms in Belgium? Which court is competent to review decisions rendered by bodies created by IGAs in Canada? Does the Belgian Council of State have jurisdiction to annul an invalid or unconstitutional cooperation agreement? The uncertainty regarding a number of

⁶ POIRIER, *Confins*.

⁷ On the consociational tradition of Belgium: SEILER, Daniel-Louis, “Un système consociatif exemplaire: la Belgique” (1997) 4:3 *Revue Internationale de Politique Comparée* 601-623; LIJPHART A., ed., *Conflict and Co-existence in Belgium: the Dynamics of a Culturally Divided Society* (Berkeley: Institute for International Studies, 1981); DUMONT, *Droit négocié*, 461.

relatively significant aspects of positive law obviously does not curb the extensive recourse to IGAs in both federations.

More profoundly, however, the very exercise undertaken in the present thesis rested on two classic paradigms, the relevance of which is constantly challenged in practice. The first is the “threshold of juridicity”. In the analysis of IGAs as contractual instruments, I posited co-existing “purely political” and legal spheres, and sought criteria for determining when an IGA, which necessarily has political foundations, moves from one category to the other. This is defensible from a positive law perspective. An instrument of legal character would need to meet a number of criteria in order to cross that border.

As a general rule, however, the effectiveness of IGAs is so high as to call into question the significance of this theoretical border.⁸ Federal partners tend to respect their undertakings, regardless of the formal status of the texts in which these are couched. In fact, IGAs which are technically invalid or unconstitutional for violating certain “public law impediments”, or Belgian “protocols” meant to circumvent formalities applicable to cooperation agreements, do not appear to be any less effective *inter partes* than agreements which can more easily be characterised as contractual instruments.

In other words, from a sociology of law perspective, IGAs seem to have the same degree of effectiveness, regardless of their legal status. This is not surprising: the same is true of any relational contract.⁹ Avoidance of judicial dispute resolution is commonplace in any long-term contractual relationship, whether it arises in a classic private or commercial context or in the domain of international law. In other words, from a sociological perspective, legal constraints may have very little bearing on the respect - or violation - of agreements between components of a federal state.¹⁰

A threshold of juridicity is also assumed in the analysis of IGAs as normative instruments. Here the exercise of characterisation is in some ways simpler. If appropriate procedures are followed, IGAs obtain a certain legal force, irrespective of their actual content. This is the case of Canadian constitutionalised agreements. It is also the case for IGAs that are properly given the force of statute in Belgium (through legislative assent) or in

⁸ On effectiveness: Rocher (1998); OST, François, Van de KERCHOVE, *De la pyramide au réseau: pour une théorie dialectique du droit* (Brussels: Facultés Universitaires St-Louis, 2002) 328-337.

⁹ BELLEY, Jean-Guy, *Le contrat entre droit, économie et société* (Cowansville: Yvon Blais, 1998) 65 ff, 256 ff. and 302 ff.

¹⁰ In the federal context, SIMMONS (2003) has shown that a greater degree of formalism does not necessarily yield more effective results in terms of policy. Her focus is intergovernmental conferences, but the diagnostic is arguably transposable to IGAs.

Canada (through incorporation). Those IGAs clearly cross the threshold from the “non-legal” sphere to the legal one, through some form of “pedigree test”.¹¹

The situation is murkier, however in the case of IGAs which do not meet those procedural hurdles. In Belgium, there is no doubt that some IGAs that should have been submitted to legislative assemblies were not.¹² It is also the case that assemblies have approved clearly unconstitutional agreements.¹³ If those are not challenged before the Court of Arbitration within six months of their coming into force, they are likely to remain effective until federal partners renegotiate them. Even assuming - for the sake of argument - that the use of IGAs as conduits for the spending power is not unconstitutional in Canada,¹⁴ federal partners constantly bind themselves through IGAs in respect of the exercise of their discretionary functions.¹⁵ Quotas determined through “non-legal” agreements are imposed on farmers. Federal partners extend services to each others’ population through “administrative” arrangements”. Some IGAs are intertwined with federal and provincial statutes and regulations in complex cooperative schemes. In some cases, the fiction that “law” only flows from the unilateral instruments involved in these interlocking schemes is difficult to sustain.¹⁶

In other words, while the paradigm of the “threshold of juridicity” applies without too much difficulty in the case of IGAs that are properly introduced in the various legal orders through official procedures, it fails to account for the effectiveness of a significant number of IGAs that have not been so introduced. Denying them any normative force on grounds that they do not meet the required procedural criteria exposes the weaknesses of the positive law analysis of IGAs. The threshold paradigm may simply be too stark for what is actually happening.

The second paradigm on which this thesis rests is the hierarchy of norms. Formally, both federations’ public law systems are based on a relatively similar pyramidal structure.¹⁷ Locating IGAs within that hierarchy is particularly difficult.¹⁸ Even when rules are relatively

¹¹ OST and Van de KERCHOVE (2002) 326, referring to DWORKIN.

¹² The 1993 federal-BRC agreement on the promotion of Brussels, or a number of agreements in the employment sector: *supra*, 5.2.1.2.

¹³ The agreement concerning the financing of the SNCB, for instance: CSLS 32.367, Doc Parl VI R (2001-2002) 269, no.1, 30.10.2001; AC relatif au plan d’investissement pluriannuel 2001-2012 de la SNCB (FED + 3R), 11.10.01 (27.11.02; 26.03.02): *supra*, 3.2.3.

¹⁴ *Supra*, 4.1.2.2.

¹⁵ For instance, through agreements on tax collection or through which federal authorities agree not to proceed with environmental assessments, in favour of provincial ones: *supra*, 4.1.3.

¹⁶ *Supra*, 5.3.2.

¹⁷ The ranking of quasi-constitutional legislation and of the Constitution of federated entities may differ slightly.

¹⁸ We have seen that even “constitutionalised” agreements may not have quite the same value *erga omnes* as other constitutional norms: *supra*, 5.1.1.

clear (subordination to the Constitution in Belgium or to unilateral legislation in Canada), the effectiveness of IGAs that contravene these rules raises doubts concerning the relevance of the paradigm.¹⁹

Moreover, the interdependence between IGAs and other norms of positive law is such that placing them in a hierarchy stretches reality. In Belgium, matters which should be determined by DMA are relegated to cooperation agreements.²⁰ The implementation of the formal distribution of competences is conditioned by the adoption of "compulsory agreements".²¹ Informal agreements alter formal rules contained in the Constitution as well as in formal agreements approved by statutes.²² Some Canadian intergovernmental regulatory arrangements involve an extraordinary maze of interlocking federal and provincial statutes and regulations, interdelegation of administrative and regulatory powers, joint bodies, formal agreements, completed by addenda and memoranda of understanding. Just trying to draw a map of the various sources of authority challenges the very idea of a hierarchical paradigm.

It may be that from the perspective of the sociology of law, the very idea of a threshold of juridicity is questionable. Similarly, the "network paradigm"²³ or the "concentric circles model"²⁴ may better account for the examples just provided than any pretence of a hierarchical structure. Case studies to assess the effectiveness of particular IGAs that are devoid of formal legal character either *inter partes* or *erga omnes* would indeed be instructive. Such enquiries may reveal how law is produced, and may help assess compliance with particular norms, irrespective of the latter's formal status. This is no doubt useful to dispel myths about the impact and significance of positive law.²⁵ I would nonetheless underline two reasons for the continued relevance of positive law in the context of inter-federal relations in general, and IGAs in particular.

First, even when public officials and courts deviate from positive law orthodoxy, they tend to defend those actions and decisions behind the language of positive law, which enjoys

¹⁹ These constitute telling illustrations of the "para-legality" phenomenon: DUMONT, *Droit négocié*; DUMONT, Hugues, *Le pluralisme idéologique et l'autonomie culturelle en droit public belge*, vol. 1, (Brussels: Bruylant, 1996) 43-51.

²⁰ See s.81, *Constitution* and AC relatif aux modalités de conclusion des traités mixtes (FED + 3C + 3R), 08.03.94 (17.12.96, 06.03.96, 23.05.96, 26.06.96, 19.07.96). On this: DUMONT, *Droit négocié*, 483-486.

²¹ *Supra*, 2.2.3.1.

²² The 10% rule concerning mixed treaties: *supra*, 3.1.2.

²³ "Network" ("réseau") has a multiplicity of meanings. At the core, however, it refers to a structure that is relatively open and in which parts are not in a hierarchical relationship: OST and Van de KERCHOVE (2002) 23-24.

²⁴ MOCKLE (2002) 20-207 proposes a concentric circles model with the Constitution at the centre, followed by legislation etc. up to informal rules which nevertheless have some normative impact.

²⁵ MOCKLE, Daniel, "Deux variations sur le thème des normes" (1997) 38 *C de D* 437-459, 437.

a wide degree of legitimacy in democratic systems.²⁶ Moreover, as CORTEN argues, the network paradigm may be a helpful device for understanding the complexity of law making, but it does not exclude the idea of a hierarchy of norms altogether.²⁷ When courts are seized of a conflict between a formal legal source and an instrument devoid of formal legal character, they will generally lean in favour of the former, or at least seek to legitimise their decisions by appealing to positive law.

In other words, different paradigms are concurrently at play. Positing the absence of any border between political and legal instruments, or substituting the paradigm of the “network” or the “concentric circle” for the classic hierarchy of norms will not provide a more complete account of what is actually going on. Positive law remains relevant, even if in practice it is often disregarded. An understanding of positive law is useful for decoding what actors – including judges - do and how they justify their actions and decisions.

A second basis of defence for positive law in the context of IGAs is more prescriptive. Faced with the inadequacy of the existing legal and judicial systems to deal with the complexity of governing in a federal state, one can simply admit that positive law lags behind the imperatives of public management. One can favour the value of efficiency - which more flexible ways of interconnected governing is supposed to promote – over transparency.²⁸ Without denying the importance of efficiency, or the slowness of legal structures to adapt to social realities, it is the case that positive law, and adapted judicial structures, play an important role in controlling what public authorities do. The development of democratic government over the last two hundred years has implied the submission of the executive branch to basic parliamentary and judicial controls. Those largely rest on the threshold and hierarchical paradigms.²⁹

If regulatory instruments are submitted to parliamentary committees in Canada, or to the legislative section of the Council of State in Belgium, why should IGAs that actually regulate joint conduct escape equivalent controls? If interlocking regulating is necessary for effective policy-making, should not structures for judicial review be adapted, or at least clarified, so that controls of unilateral administrative action which have taken decades to evolve are not simply discarded, or rendered opaque, when governments act together? It

²⁶ CORTEN, Olivier, “La persistance de l’argument légaliste: éléments pour une typologie contemporaine des registres de légitimité dans une société libérale”, (2002) 50 *Droit et société* 1-24, 16.

²⁷ CORTEN, Olivier, “De la pyramide au réseau?: Autour de F. Ost et M. van de Kerchove” (2002) *Pyramides* 239-250, 250.

²⁸ *BC (Milk Board) v. Grisnich*, [1995] 2 SCR 895.

²⁹ OST and Van de KERCHOVE (2002; 309-383) posit three distinct, but in some ways intersecting registers of validity: empirical or factual (effectiveness); axiological (legitimacy) and formal (consistent with positive law). While the first two are often neglected by traditional jurists, I would argue that the last one should not be cast aside.

may be that legal rules or judicial structures need to be adapted to better account for inter-federal institutions. It may be that the “alternative” doctrines, which were examined at the end of each chapter in Part II represent a worthy compromise between the traditional models and the rejection of the relevance of positive law altogether.³⁰ In any event, positive law is relevant to ensure that executives cannot do together, under the guise of cooperation, what they cannot do separately.

Finally, no federal structure can subsist without a significant degree of legal control over actions by the various federal partners.³¹ It has traditionally been admitted that some external arbitrator is required to protect the distribution of competences which grounds any federal regime. It is no doubt true that orders of governments cannot act in isolation, whether this distribution is effected on an exclusive basis (as in Belgium) or is shared to a significant degree (in Canada). This does not, however, justify the marginalisation of positive law, particularly constitutional norms, for the sake of efficiency.³² If executives cannot legislate by contract, allowing them to restructure the federal structure by agreement, under the guise of cooperation, is similarly problematic and constitutes a threat to the “federal” rule of law. The “network” and the “no threshold” paradigms may provide helpful insights into the way federal partners structure their relations, notably through IGAs. This does not exclude the relevance of more classic rules of positive constitutional law as safeguards for the federal edifice.

³⁰ *Supra*, 4.4, 5.4 and 6.3.

³¹ “Law permeates federalism”: MOORE (1935) 201.

³² GAUDREAU-DESBIEUX (*Normative*, 39) argues that government action should be susceptible of third party adjudication. This need not imply the enforcement of a particular outcome, but would at least require federal partners to justify actions that negatively affect other members of the federation.

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- *R. v. Dominion of Can. Postage Stamp Vending Co.*, [1930] SCR 500
- *R. v. Sutherland*, [1980] 2 SCR 451
- *Re Agricultural Products Marketing*, [1978] 2 SCR 1198
- *Re Anti-Inflation Act*, [1976] 2 SCR 373 [*Anti-Inflation Reference*]
- *Re Arising out of the Transfer of the Natural Resources to the Province of Saskatchewan*, [1931] SCR 262
- *Re Bowater's Newfoundland Pulp and Paper Mills Ltd*, [1950] SCR 608
- *Re Canada Assistance Plan*, [1991] 2 SCR 525 [*the CAP Reference*]
- *Re Canada Assistance Plan*, (1990) 46 BCLR (2d) 273 (BCCA)
- *Re Finlay and Director of Welfare (Winnipeg South/West)* (1976), 71 DLR (3d) 597 (MBCA)
- *Re Interpretation of a Certain Agreement Entered into between Canada and Alberta on March 29, 1973*, [1983] 1 FC 567 (TD)
- *Re Lofstrom and Murphy et al.*, (1971) 22 DLR (3d) 120 (SKCA)
- *Re Manitoba Government Employees Assoc.* [1978] 1 SCR 1123
- *Re Manitoba Language Rights*, [1992] 1 SCR 212
- *Re Newfoundland Continental Shelf*, [1984] SCR 86
- *Re Objection by Québec to Resolution to Amend the Constitution*, [1982] 2 SCR 793 [*the Québec Veto Reference*]
- *Re Offshore Mineral Rights of BC*, [1967] SCR 762
- *Re Resolution to Amend the Constitution*, [1981] 1 SCR 754 [*the Patriation Reference*]
- *Re Tax on Foreign Legations*, [1943] SCR 208
- *Re the Secession of Québec*, [1998] 2 SCR 217 [*the Secession Reference*]
- *Re Troops in Cape Breton*, [1930] SCR 554
- *Rederiaktiebalaget Amphitrite v. R.*, [1921] 2 KB 500
- *Roman Corp. v. Hudson's Bay Oil and Gas*, [1973] SCR 820
- *Ruel v. Marois (C.A.Q.)* (500-09-006303-986) 30.10. 2001 (REJB 2001-27081)
- *Samson v. R.*, [1957] SCR 832
- *Schavernocho v. Foreign Claims Commission*, [1982] 1 SCR 1092
- *Secunda Marine Services Ltd v. Canada*, 2003 NSSC 2 (canlii) [*Secunda case*]
- *South Australia v. Commonwealth* (1962) 108 CLR 130 (HCA) 154 [*the Railway Standardisation case*]
- *Schavernocho v. Foreign Claims Commission*, [1982] 1 SCR 1092
- *Sunday v. St-Lawrence Seaway Authority*, [1977] 2 FC 3 (TD)
- *Unilever Canada Inc. v. AG Québec*, [1999] RJQ 1720 (SCQ) [*the "Colour of Margarine case"*, quoted to electronic version: <http://azimut.soquij.qc.ca/>]
- *Union Oil Co. of Can. Ltd. v. R.*, [1974] 2 FC 452 ; aff., [1976] 1 FC 74 (FCA) ; aff. [1976] 2 SCR v.

- *Verreault & Fils v. AG Québec*, [1977] 1 SCR 41
- *Vriend v. Alberta*, [1998] 1 SCR 493
- *Wells v. Newfoundland*, [1999] 3 SCR 199
- *West Lakes Ltd. v. South Australia* (1980), 25 SASR 389
- *YMCA v. Brown*, [1988] 1 SCR 1532

Arbitration awards

- Re Taxation Agreement Between the Government of Saskatchewan and the Government of Canada, (1946) 1 WWR 257 [the Tax Rental Agreement case]
- Arbitration between Newfoundland and Labrador and Nova Scotia concerning portions of the limits of their offshore areas, Award of the Tribunal in the First Phase, Ottawa, 17.05.2001 ; Second Phase 26.03.2002 : www.boundary-dispute.ca [NS-NF Arbitration; unless otherwise indicated, reference is to first phase]

APPENDIX A: Persons interviewed*

BELGIUM

ALLEN, André Judge, Court of Arbitration Professor of Constitutional Law University of Leuven	CARTON, Vincent Chief of Staff Federal Transport Minister
CEREXHE, Etienne* Former Senator Former Judge at the Court of Arbitration	CIETERS, Herman Secretariat to the Concertation Committee Federal Chancery
CLAREBOUT, Gilles Attaché Cabinet of the Minister-President Brussels-Capital Region	DAUW, Frédéric Attaché Cabinet of the Minister-President Brussels-Capital Region
DELEEUW, Patrick Legislative Editor Parliament of the Brussels-Capital Region	DELGRANGE, Xavier <i>Auditeur</i> Council of State
GRUSELIN, Michèle Assistant Chancery of the Brussels-Capital Region	JANS, Théo Political Science Professor Vrije Universiteit Brussel
KALBUSCH, Xavier* Advisor External Relations German-speaking Community	LAGASSE, Charles-Étienne Deputy-Director Commissariat for Foreign Affairs of the French Community (CGRI)
LECOCQ, Patricia Advisor Assistance to Victims Federal Department of Justice	LEROY, Michel Member of the Council of State Administrative Law Professor Université Libre de Bruxelles
LETISTE, Béatrice* Chancery to the French Community Commission of the Brussels-Capital Region	LEUS, Kaat Administrative Law Professor Vrije Universiteit Brussel Advisor to the Federal Minister in Charge of the Civil Service
MOERENHOUT, Roger Référéndaire (permanent law clerk) Court of Arbitration	MOLLET, Laurent* Communications specialist Flemish Government
NICAISE, Dominique Advisor Federal Chancery	PAULET, Alain* Director Walloon Chancery
POOT, Edith* Legal advisor Common Community Commission of the Brussels-Capital Region	QUERTAINMONT, Philippe Administrative Law Professor Member of the Council of State
TOMBEUR, Herbert Director of International Relations Flemish Government	TRUFFIN, Claude President of the Federal Council for Research
VANDERMEESCH, Sigurd Director of cooperation Cabinet of the Flemish Minister responsible for Brussels	VAN HEYL, Damien Special advisor to the Minister in charge of constitutional reforms (Fr)

* Interviews were conducted in the 2001-2002 academic year. Titles may have changed since then.

CANADA

BARIBEAU, Jean-Pierre Contravention Project Department of Justice Canada	BOURQUE, Clément Advisor Secrétariat aux affaires intergouvernementales canadiennes (SAIC) Government of Québec
CHEVRETTE, François Professor of Constitutional Law University of Montréal	COULOMBE, Pierre Policy Analyst Privy Council
FRANCOEUR, Michel General Counsel and Director Legal Services Department of Canadian Heritage	FRASER, Douglas Deputy Director Treaty Division Department of Foreign Affairs of Canada
FRÉDÉRIC, Michel Advisor, SAIC Government of Québec	GAUDREAU-DESBIENS, Jean-François Professor of Constitutional Law University of Toronto
GIROUX, Robert Technical specialist Responsible for the Federal Registry Privy Council Office	GUAY, Louis Federal-Provincial Relations Privy Council Office
GUÉNETTE, Hélène General Manager Office of the Secretary General SAIC Government of Québec	HERTZ, Allen Policy Advisor Federal-Provincial Relations Privy Council Office
HILLING, Carol Legal Counsel Aboriginal and Constitutional Affairs Library of Federal Parliament.	HORTH, Camille Under-secretary SAIC Government of Québec
HOULE, France Professor of Administrative Law Law Faculty University of Montréal	LAFLAMME, Pauline Legal Counsel Legal Affairs Direction Department of Industry, Commerce, International and Intergovernmental Relations Government of Québec
LAJOIE, Andrée Professor of constitutional law University of Montréal	LANGLOIS, Louise Technician in charge of the Registry of Intergovernmental Agreements Government of Québec
LAZAR, Harvey Director Institute of Intergovernmental Relations Queen's University	LORD, François Policy Advisor Direction of the Canada-Québec Agreement on Labour Market Department of Employment Government of Québec
MCFADYEN, Craig Director Office for Constitutional Affairs and Federal- Provincial Relations Department of Intergovernmental Relations Government of Ontario	MORGAN, Marta General Director Social Policy towards children Department of Human Resources
NAGLER, Adam Policy Advisor Department of Intergovernmental Relations Government of Ontario	PELLETIER, Benoît Minister of Intergovernmental Affairs for Québec and Professor of Constitutional Law University of Ottawa

ROBITAILLE, Claire Policy Specialist In charge of Implementation of the Labour Market Agreement Government of Québec	RENÉ-DE-COTRET , Michèle Legal Services Department of Natural Resources Government of Canada
RUTT, Sylvie Technician in charge of the Registry of Intergovernmental Agreements Privy Council Office	SEIDLE, Leslie Director of Research Privy Council Office
THEROUX, Éric Director Legal Services Intergovernmental and International Relations Government of Québec	TODD, Robert W. Principal Advisor Federal-Provincial-Territorial Relations Department of Foreign Affairs Government of Canada
TREMBLAY, Marc Senior Counsel Official Languages Division Department of Justice Canada	TURP, Daniel Member of the Québec National Assembly (opposition) Official spokesperson on Intergovernmental and International Affairs
VALLERAND, Réjean Clerk to the Cabinet (<i>greffier</i>) Department of Executive Council Government of Québec	WATTS, Ronald Emeritus Professor Institute of Intergovernmental Relations Queen's University
WHILLAN, David Senior Policy Advisor Intergovernmental Relations Privy Council Office	

A number of persons interviewed in other countries, in the context of another research project have also provided extremely useful insights. I particularly want to underline:

SPAIN

AJA, Eliseo Constitutional Law Professor Director of the Institute for Public Law University of Barcelona	CORRETJA I TORRENS, Merce Assistant Director Legal Services Department of Institutional Relations Government of Catalonia
GARCIA MORALES, Maria Jesus Constitutional Law Professor University (autonoma) of Barcelona	VINTRO i CASTELLS, Joan Constitutional Law Professor University of Barcelona Legal advisor to the Parliament of Catalonia

SWIZERLAND

ABDERHALDEN, Ursula Advisor Federal Department of Justice	CHÉRIX, François Coordinator Union for a Switzerland of Regions Member of the Constitutive Assembly for the Canton of Vaud
DAFFLON, Bernard Economics Professor University of Fribourg	FLEINER, Thomas Director Institute of Federalism University of Fribourg
ISCHI, Nivardo General Secretary The University Conference of Switzerland	LUSIER, Christelle Member of the Constitutive Assembly for the Canton of Vaud
MALAGUERRA, Danièle Advisor Federal Relations Service Federal Department of Justice	SCHMITT, Nicolas Researcher Institute of Federalism University of Fribourg

UNITED KINGDOM

ALEXANDER, Wendy Member of the Scottish Assembly Former Minister of Industry and Higher Learning	BROWN, Alice GOVERNANCE OF SCOTLAND FORUM University of Edinburgh
HAZELL, Robert The Constitution Unit School of Public Policy University College London	OLIVER, Peter Senior Lecturer King's College London
RAWLINGS, Richard Professeur de droit constitutionnel et administratif London School of Economics	

APPENDIX B

BELGIAN COOPERATION AGREEMENTS

Parties: (Parties to agreements are summarised in brackets)

C=	Communities (3C = every Community)
COCOF =	French Community Commission of the Region of Brussels Capital
COCON =	Flemish Community Commission of the Region of Brussels Capital
COCOM =	Common Community Commission of the Region of Brussels Capital
FED =	Federal authority
FI C =	Flemish Community
FI C/R =	Flemish Community & Region
Fr C =	French Community
FI R =	Flemish Region
GC =	German-speaking Community
R =	Regions (3R = every region)
RBC =	Region of Brussels-Capital
WR =	Walloon Region

Codes: when a code is provided, it is drawn from the Registry of the Secretariat to the Concertation Committee. When no code is provided, the agreement was obtained through different means (interviews with Departments, etc.)

Dates:

The first date refers to the date of signature (or last signature). The date in brackets is the date of publication in the *Moniteur belge*, when the agreement was published. In many cases, only one or some of the parties to an agreement proceeded with legislative assent and publication. This is NOT noted here.

FEDERAL, REGIONS AND COMMUNITIES

- Conventions en exécution de l'article 77 de la loi spéciale du 16 janvier 1989 relative au financement des Communautés et des Régions (FED + 3R + 3C), 11.04.1989, 09.05.1989, 18.05.1989, 31.05.1989
VI – D11.258/1
- Convention en vue de la gestion de la Trésorerie des Communautés et des Régions par l'Administration de la Trésorerie de l'Etat (FED + 3R + 3C), 16.03.90 (31.07.90)
VI – D11.258/2
- Accord de coopération sur le financement, le fonctionnement et la gestion de l'Institut d'hygiène et d'épidémiologie (Dénomination correcte : Institut scientifique de la Santé publique Louis Pasteur) (FED + 3C + 3R), 22.03.90, 18.05.95, 30.03.01 (19.05.90, 06.09.95)
XI – D11.308/4
- Accord de coopération visant à assurer une restructuration harmonieuse du Fonds national de reclassement social des handicapés (FED + 3C + COCOM), 18.04.91 (24.08.91)
XI – D11.308/8
- Protocole relatif à la participation de la Belgique à Eureka (FED + 3C + 3R), sans date (15.05.90)
IV – D11.238/6
- Accord de coopération relatif à l'établissement des commissions "Coopération internationale" et "Coopération fédérale" de la Conférence interministérielle de la politique scientifique (FED + 3C + 3R), 01.02.91 (09.02.91)
IV – D11.238/2

- Accord de coopération relatif à l'association des Communautés, des Régions et de la Commission communautaire commune aux activités de la Communauté européenne en matière de politique scientifique et à l'organisation au plan interne d'activités connexes (FED + 3R + 3C), 01.02.91 (09.02.91)
IV – D11.238/3
- Accord de coopération relatif à la réinsertion des chômeurs de longue durée (FED + 3C + 3R), 05.06.91
VIII – D11.278/5
- Accord de coopération pour la gestion commune de certains éléments du patrimoine de l'Institut économique et social des classes moyennes (FED + 3C + 3R), 10.07.91 (20.11.91)
III – D11.228/16
- Convention en exécution de l'article 54, §1er, troisième alinéa de la loi spéciale du 16 janvier 1989 relative au financement des Communautés et Régions (FED + 3C + 3R), 20.09.91
VI – D11.258/4
- Accord de coopération portant création d'une base documentaire générale (FED + 3C + 3R + COCOM), entrée en vigueur le 01/10/91
VI – D11.258/13
- Accord de coopération concernant le Plan d'accompagnement des chômeurs (FED + 3C + 3R), 22.09.92, 07.04.95, 13.02.96, 29.10.97, 03.05.99 (21.11.92, 04.07.95, 24.04.96, 02.12.97, 07.09.99)
VIII – D11.278/9
- Accord de coopération relatif à la coordination de la politique en matière de réglementation du chômage et la politique en matière de formation professionnelle dans un établissement d'enseignement (FED + Fr C + GC + WR + RBC), 10.02.93 (28.10.93)
VIII – D11.278/8
- Accord de coopération relatif à la représentation du Royaume de Belgique au sein du Conseil des Ministres de l'Union européenne (FED + 3C + 3R + COCOM), 08.03.94 (17.11.94)
V – D11.248/2
- Accord de coopération relatif aux modalités de conclusion des traités mixtes (FED + 3C + 3R), 08.03.94 (17.12.96, 06.03.96, 23.05.96, 26.06.96, 19.07.96)
V – D11.248/3
- Accord de coopération relatif aux modalités de conclusion des traités mixtes (FED + 3C + 3R + COCOM), 08.03.94
V – D11.248/3
- Accord de coopération relatif à la représentation du Royaume de Belgique au sein du Conseil des Ministres de l'Union européenne. (Application de l'article 146 du Traité sur l'Union européenne) (FED + 3R + 3C), 08.03.94 (17.11.94) ; am. 13.02.03 (25.02.03)
V – D11.248/2
- Accord de coopération relatif à la coopération entre les communes en matière de politique hospitalière (FED + RBC + COCOM), 19.05.94 (27.05.94, 12.10.94, 24.06.95)
XI – D11.308/10
- Accord de coopération pour le transfert obligatoire, sans indemnisation, du personnel et des biens, droits et obligations de la province de Brabant vers la province du Brabant wallon, la province du Brabant flamand, la Région de Bruxelles-Capitale, les Commissions communautaires visées à l'article 60 de la loi spéciale du 12 janvier 1989 relative aux institutions bruxelloises, et vers l'autorité fédérale (FED + 3R + FL C + Fr C), 30.05.94, 28.10.94, 23.12.94, 16.03.95 (17.06.94, 02.12.94, 05.07.95, 20.05.95)
VII – D11.268/3
- Accord-cadre de coopération portant sur la représentation du Royaume de Belgique auprès des organisations internationales poursuivant des activités relevant de compétences mixtes (FED + 3C + 3R), 30.06.94 (19.11.94)
V – D11.248/4
- Accord de coopération portant sur la représentation du Royaume de Belgique auprès des organisations internationales poursuivant des activités relevant de compétences mixtes (FED + 3C + 3R + COCOM), 01.07.94 (19.11.94)
V – D11.248/4

- Accord de coopération concernant les modalités suivant lesquelles des actions sont intentées devant une juridiction internationale ou supranationale suite à un différend mixte (FED + 3C + 3R), 11.07.94 (01.12.94)
V – D11.248/5
- Protocole réglant l'association des Exécutifs à l'élaboration des règles de police générale et de la réglementation relatives aux communications et aux transports, ainsi qu'aux prescriptions techniques relatives aux moyens de communication et de transport (FED + 3C + 3R), 10.11.94 (30.11.94) ; 24.04.01 (19.09.01)
III – D11.228/24
- Accord de coopération relatif au statut des représentants des Communautés et des Régions dans les postes diplomatiques et consulaires (FED + 3C + 3R), 18.05.95
V – D11.248/7
- Accord de coopération relatif aux objectifs budgétaires pour la période 1996 –1999 (FED + 3C + 3R), 19.07.96 (19.03.97) ; prolongation 2001-2005, 15.12.00
VI – D11.258/9
- Accord de coopération relatif au programme de transition professionnelle (Fr C + GC + WR), 03.07.97 (03.03.98, 05.03.99) ; am. 03.06.98 (05.03.99, 18.11.99)
VIII – D11.278/14
- Accord de coopération concernant le mode de répartition des frais des receveurs régionaux et le mode de prélèvement de la contribution dans ces frais par les administrations (FED + FI C + GC + WR), 09.12.97 (26.08.99, 07.12.00, 07.12.00)
VII – D11.268/4
- Accord de coopération relatif à la continuité de la politique en matière de pauvreté (FED + 3C + 3R + COCOM), 05.05.98 (10.07.99, 28.07.99)
XVIII – D11.378/2
- Accord de coopération en matière d'assistance aux victimes (FED + Fr C + WR), 14.05.98
XVIII – D11.378/
- Protocole réglant les rapports entre les organismes issus de la restructuration de l'Office national de l'emploi (FED + 3C + 3R), 22.12.98
D11.278/1
- Accord de coopération entre l'Autorité fédérale, les Communautés et les Régions relatif à la participation de la Belgique à l'Exposition universelle de Hanovre en 2000. (FED + 3C + 3R), 28.04.99 (07.09.99)
II – D11.218/6
- Accord de coopération entre l'Etat fédéral, la Communauté française, la Communauté flamande, la Communauté germanophone, la Région wallonne, la Région flamande et la Région de Bruxelles-capitale relatif aux modalités de désignation des représentants des Communautés et des Régions au comité d'orientation et au comité scientifique sur le budget économique constitués par les articles 115 et 116 de la loi du 21 décembre 1994 portant des dispositions sociales et diverses (FED + 3R + 3C), 26.05.99 (10.03.00)
II – D11.218/7
- Protocole réglant les différentes formes de collaboration entre le Gouvernement fédéral et les Gouvernements des Communautés et des Régions (FED + 3R + 3C), 27.10.99 (3.5.90, 23.6.92) (that is, the last published version dates from 1992, but a new one does exist)
I - D11.01
- Accord de coopération concernant l'insertion des demandeurs d'emploi vers la convention de premier emploi (FED + 3C + 3R), 30.03.00 (09.12.00)
VIII - D11.278/17
- Accord de coopération relatif à l'économie sociale (FED + 3R + GC), 04.07.00 (02.10.01)
XVIII – D11.378/7
- Accord de coopération concernant le parcours d'insertion des demandeurs d'emploi vers la convention de premier emploi (FED + 3C + 3R), 31.08.01 (27.09.01)
VIII – D11.278/18
- Accord de coopération concernant le développement des services et des emplois de proximité (FED, 3R, 3C), 07.12.01 (03.05.02, 27.11.02, 05.12.02, 05.02.03)
VIII – D11.278/20
- Accord de coopération relatif à la force obligatoire des conventions collectives de travail (FED + 3C + 3R), 12.12.02
VIII – D11.278/21

- Protocole en matière de clauses sociales dans les marchés publics passés par un organisme fédéral (FED + 3R + GC), 18.07.02
XVIII – D11.378/8
- Accord de coopération pour une politique de drogues globale et intégrée (FED + 3C + COCOF + COCON + COCOM + 3R), 11.05.2003 (02.06.2003)
XI – D11.308/16

FEDERAL AND REGIONS

- Convention relative au règlement des dettes du passé et charges s'y rapportant en matière de logement social (FED + 3R), 31.03.87
- Accord de coopération concernant l'estampillage des cartes des travailleurs à temps partiel involontaires (FED + 3R), 15.04.89
VIII – D11.278/2
- Accord de coopération entre l'Etat belge agissant pour la Régie des voies aériennes et les Régions (FED + 3R), 30.11.89 (09.03.90)
III – D11.228/2
- Convention relative au règlement des modalités de remboursement des dettes des régions au Fonds d'aide au redressement financier des communes (FED + 3R), 18.01.90
VII – D11.268/1
- Convention sur l'utilisation future des fonds du "volet des services" du plan textile (FED + FI R), 22.01.90
II – D11.218/2
- Accord de coopération relatif à la répartition et à la destination de biens immeubles (FED + RBC), 09.03.90 (17.05.90)
III – D11.228/10
- Accord de coopération relatif à la mise en application des règlements des Communautés européennes au sujet de l'assainissement structurel dans la navigation intérieure. (FED + 3R), 23.03.90 ; annexe 1, 12.09.96 ; annexe 2, 12.09.96
III – D11.228/3
- Accord de coopération relatif à la réalisation du projet Egmont (FED + RBC), 23.03.90 (23.05.90)
III – D11.228/9
- Accord de coopération relatif au fonctionnement de la Direction de la comptabilité du Ministère des Travaux Publics (FED + WR + FI R), 23.03.90 (08.05.90)
III – D11.228/5
- Accord de coopération relatif au fonctionnement du Service de topographie et de photogrammétrie, de l'imprimerie et la section de photographie de la bibliothèque, la photothèque et la cartotheque du Ministère des Travaux Publics (FED + 3R), 01.04.90 (20.06.90)
III – D11.228/7
- Accord de coopération relatif à l'autorité hiérarchique du Ministère des Travaux Publics (FED + 3R), 09.04.90 (20.06.90)
III – D11.228/8
- Accord de coopération relatif à la gestion administrative des dossiers litigieux en matière de Travaux Publics (FED + 3R), 09.04.90 (20.06.90)
III – D11.228/6
- Accord de coopération visant à la protection de la Mer du Nord contre les effets négatifs sur l'environnement des déversements de déblais de dragage dans les eaux tombant sous l'application de la Convention d'Oslo (FED+ FI R), 12.06.90 (22.08.90) ; am. 06.09.00 (21.09.00)
XII – D11.318/3
- Protocole entre le Gouvernement et l'Exécutif de la Région de Bruxelles-Capitale, concernant la compétence des comités d'acquisition d'immeubles et des bureaux des domaines de l'Etat (FED + RBC), 25.06.90 (02.08.90)
VI – D11.258/3
- Arrangement en matière de coordination des activités de commerce extérieur (FED + 3R), 09.10.90 (17.01.91)
V – D11.248/1

- Accord de coopération en vue d'une meilleure protection de la Mer du nord contre la pollution (FED + 3R), 11.11.90
XII – D11.318/13
- Convention relative au complexe de bâtiments aux n° 2-4-6 de la Rue Royale et aux n° 10-11 de la Place royale (FED + RBC), 11.12.90 (14.01.91)
III – D11.228/13
- Accord de coopération concernant le financement des centres collectifs (FED + 3R), 08.03.91 (15.05.91), 05.08.94 (01.10.94), 05.04.95 (30.05.95)
(I - D11.238/1)
- Accord de coopération relatif aux réseaux de télécommunication et de télécontrôle (FED + 3R), 17.06.91 (11.12.91)
III – D11.228/4
- Accord de coopération relatif à l'assurance de la qualité technique dans la construction (FED + 3R), 17.06.91 (11.12.91)
III – D11.228/18
- Accord de coopération en vue de la coordination du programme de recherche en sciences marines (FED + FI R), 05.09.91 (19.11.91)
IV – D11.238/4
- Accord de coopération relatif à la cellule de liquidation du Fonds des routes (FED + 3R), 12.11.91 (15.01.92) ; avenant n°1, 18.07.92 (01.09.92)
III – D11.228/15
- Accord de coopération relatif à la coordination des activités liées à l'énergie (FED + FI R), 18.12.91 (26.02.92)
(II – D 11.218/3)
- Accord de coopération relatif à l'extension des réseaux de radiotéléphonie des services de secours et de sécurité aux ouvrages souterrains exploités par la S.T.I.B. (FED + RBC), 04.12.92 (02.02.93)
III – D11.228/21
- Accord de coopération relatif à certaines initiatives destinées à promouvoir le rôle international et la fonction de capitale de Bruxelles (FED + RBC), 15.09.93 (30.11.93) ; avenant n°1, 29.07.94 (11.10.94) ; avenant n°2, 22.05.97 (01.10.97) ; avenant n°3, 29.01.98 (02.07.98) ; avenant n°4, 02.06.99 (08.10.99) ; avenant n°5, 28.02.00 (21.09.00) ; avenant n°6, 16.01.01 (21.04.01) ; avenant n°7, 27.02.02 (12.09.02) ; avenant n°8, 20.02.03 (09.07.03)
III – D11.228/22
- Convention relative au règlement des dettes du passé et charges s'y rapportant en matière de logement social (FED + 3R), 01.06.94 (02.06.95)
VI – D11.258/6
- Accord de coopération relatif aux attachés économiques et commerciaux régionaux et aux modalités de promotion des exportations (FED + 3R), 17.06.94 (26.10.94)
V – D11.248/6
- Accord de coopération portant exécution de l'article 6bis, §2, point 6, de la loi spéciale du 8 août 1980 de réformes institutionnelles, inséré par la loi du 8 août 1988 et modifié par la loi du 16 juillet 1993 (FED + 3R), 12.07.94 (17.06.95)
IV – D11.238/5
- Accord de coopération portant coordination de la politique d'importation, d'exportation et de transit des déchets (FED + 3R), 26.10.94 (13.12.95)
XII – D11.318/5
- Accord de coopération relatif aux investissements étrangers (FED + FI R), 07.02.95 (29.06.95)
II – D11.218/4
- Accord de coopération concernant la mise en oeuvre du règlement (CEE) n° 1836/93 du Conseil du 29 juin 1993 permettant la participation volontaire des entreprises du secteur industriel à un système communautaire de management environnemental et d'audit (FED + 3R), 30.03.95 (03.10.95)
XII – D11.318/9
- Accord de coopération relatif à la coordination des contrôles concernant l'occupation des travailleurs de nationalité étrangère (FED + 3R), 31.03.95
VIII – D11.278/10

- Accord de coopération relatif à la politique internationale de l'environnement (FED + 3R), 05.04.95 (13.12.95)
XII – D11.318/8
- Accord de coopération relatif à l'eurovignette ainsi qu'aux droits d'usage routiers ou redevances liées à l'usage des routes et de leurs dépendances (FED + 3R), 06.04.95, 06.02.97
VI – D11.258/7
- Accord de coopération relatif au statut des représentants de la Commission communautaire commune dans les postes diplomatiques et consulaires (FED + COCOM), 18.05.95
V – D11. 248/7
- Accord de coopération relatif à la structuration des données environnementales destinées à l'Agence européenne de l'environnement (FED + 3R), 21 .12.95 (14.06.96)
XII – D11.318/10
- Contrat-cadre relatif à l'organisation des missions confiées par le Ministère de la Région de Bruxelles-Capitale au Ministère fédéral des affaires économiques (FED + RBC), 15.10.96
II – D11.218/5
- Accord de coopération relatif à l'aménagement de locaux au profit de services de secours et de sécurité oeuvrant dans les infrastructures d'ouvrages souterrains exploités par la Société des Transports Intercommunaux de Bruxelles (FED + RBC), 07.11.96 (30.11.96)
III – D11.228/25
- Accord de coopération relatif au programme de transition professionnelle (FED + 3R), 04.03.97 (09.08.97) ; et Accord de coopération modifiant l'accord de coopération du 4 mars 1997 entre l'Etat fédéral et les Régions, 15.05.98 (01.08.98, 23.12.98)
VIII – D11.278/13
- Accord de coopération relatif à la coordination administrative et scientifique en matière de biosécurité (FED + 3R), 25.04.97 (14.07.98)
XI – D11.308/11
- Accord de coopération relatif au plan d'appui scientifique à une politique de développement durable (FED + 3R), 24.10.97 (04.02.98)
IV – D11.238/7
- Accord de coopération concernant la guidance et le traitement d'auteurs d'infractions à caractère sexuel (FED + WR), 08.10.98 (11.09.99)
XV – D11.348/2
- Convention portant objectifs budgétaires pour la période 2001-2005 (FED + 3C + 3R), 15.12.00
- Accord de coopération concernant l'exercice de la tutelle spécifique instaurée par la loi du 7 décembre 1998 (M.B. 05.01.99) organisant un service de police intégré, structuré à deux niveaux (FED + 3R), 01.04.01 (19.04.02, trad. allemande 05.02.03)
VII – D11.268/5
- Accord de coopération concernant la maîtrise des dangers liés aux accidents majeurs impliquant des substances dangereuses (FED + 3R), 21.06.99 (12.10.00, 16.06.01)
XII – D11.318/15
- Accord de coopération concernant la convention de premier emploi (FED + RBC), 25.10.00 (18.12.01, 2^e ed.) ; 2^{ème} accord, 01.08.02 (19.11.02)
VIII – D11.278/19
- Accord de coopération concernant la convention de premier emploi (FED + WR), 25.10.00 (18.12.01, 2^e ed.) ; 2^{ème} accord, 01.08.02 (19.11.02)
VIII – D11.278/19
- Accord de coopération relatif à l'exécution et au financement de l'assainissement du sol des stations-service (FED + 3R), 22.03.01, 13 .12.02 (26.02.03)
XII – D11.318/16
- Protocole réglant l'association des Gouvernements des Régions à l'élaboration des règles de police générale et de la réglementation relatives aux communications et aux transports, ainsi qu'aux prescriptions techniques relatives aux moyens de communication et de transport, ainsi qu'aux règles relatives à l'organisation et la mise en œuvre de la sécurité de la circulation aérienne sur les aéroports régionaux et les aérodromes publics (FED + 3R), 24.04.01 (19.09.01)
III – D11.228/24
- Accord de coopération relatif au plan d'investissement pluriannuel 2001-2012 de la S.N.C.B. (FED + 3R), 11.10.01 (27.11.02 ; 26.03.02)
III – D11.228/28

- Accord de coopération relatif à l'intervention des pouvoirs publics dans la participation de l'industrie belge au programme AIRBUS A380 (FED + 3R), 20.11.01 (12.09.02)
IV-D11.238/9
- Accord de coopération relatif à l'intervention des pouvoirs publics dans la participation de l'industrie belge au programme AIRBUS A380 (FED + 3R), 20.11.01 (12.09.02)
IV – D11.238/9
- Accord de coopération relatif à l'échange d'informations dans le cadre de l'exercice de leurs compétences fiscales, aux procédures de concertation concernant l'applicabilité technique des modifications aux impôts régionaux projetées par les Régions et à l'applicabilité technique de l'instauration par les Régions de réductions ou d'augmentations générales de l'impôt de personnes physiques dû (FED + 3R), 07.12.01 (11.12.02)
VI – D11.258/14
- Accord de coopération relatif aux modalités de nomination et de révocation des représentants, membres des sociétés régionales de transports siégeant au Comité d'Orientation de la S.N.C.B. (FED + 3R), 22.03.02 (07.11.02)
III – D11.228/29
- Accord de coopération relatif à la création d'une Agence pour le Commerce extérieur (FED + 3R), 24.05.02 (18.12.02)
V – D11.248/12
- Accord de coopération relatif à la représentation du Royaume de Belgique au sein du Comité de coordination instauré par l'article 14 de l'Accord du 9 février 1994 relatif à la perception d'un droit d'usage pour l'utilisation de certaines routes par des véhicules utilitaires lourds (Eurovignette) (FED + 3R), 18.07.02 (23.10.02)
III – D11.228/30
- Accord de coopération relatif à la gestion des déchets libérés (FED + 3R), 17.10.02 (15.01.03)
XII – D11.318/17
- Accord de coopération relatif à la création de l'Agence de l'Information Patrimoniale (FED + 3R), 24.10.02
VI – D11.258/15
- Accord de coopération relatif à l'établissement, l'exécution et le suivi d'un Plan national climat, ainsi que l'établissement de rapports, dans le cadre de la Convention-cadre des Nations Unies sur les changements climatiques et du Protocole de Kyoto (FED + 3R), 14.11.02 (10.07.03)
XII – D11.318/18
- Accord de coopération relatif au quartier Leopold-Schuman (FED + RBC), 17.01.03
III – D11.228/31
- Accord de coopération concernant l'exercice des compétences régionalisées dans le domaine de l'agriculture et de la pêche (FED + 3R), 18.06.03
X – D11.298/3
- Protocole financier à l'accord de coopération du 05.04.1995 relatif à la politique internationale de l'environnement (FED + 3R), 02.10.2003 (16.10.03)

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- Protocole entre le Gouvernement national et les autorités visées aux articles 59*bis* et 59*ter* de la Constitution sur la répartition des compétences concernant la protection de la personne des malades mentaux dans l'optique des soins de santé (FED + 3C), 15.06.89 (24.01.90)
XI – D11.308/1
- Accord de coopération relatif à la gestion administrative des charges du passé en matière d'enseignement (FED + Fr C + FI C), 07.08.89 (05.10.89)
XIII – D11.328/1
- Accord de coopération relatif à la gestion administrative de l'enseignement en Communauté germanophone (FED + Fr C + GC), 07.08.89 (05.10.89)
XIII – D11.328/2
- Accord de coopération relatif au personnel du Fonds national de garantie des bâtiments scolaires (FED + 3C), 07.08.89 (05.10.89)
XIII – D11.328/3

- Accord de coopération concernant l'aide à l'industrie cinématographique (FED + Fr C, FI C), 19.01.90 (24.03.90)
(II – D11.218/1)
- Accord de coopération relatif à l'intervention de l'Inspection des services d'incendie, créée par la loi du 31 décembre 1963 sur la protection civile, dans la procédure d'agrément des structures pour personnes âgées (FED + FI C), 31.07.90 (13.09.90)
VII – D11.268/2
- Accord de coopération relatif au respect des obligations de la Belgique envers les écoles européennes, et à leur financement (FED + 3C), 30.11.90 (20.02.91)
XIII – D11.328/4
- Convention relative aux terrains expropriés en vue de l'aménagement d'un canal de dérivation entre le canal Albert et le port d'Anvers (FED + FI C), 18.01.91 (08.05.91, 08.10.91)
III – D11.228/23
- Accord de coopération relatif à l'exécution, restauration pour le compte de la Communauté flamande, de travaux de restauration et d'aménagement en vue de l'hébergement de ses cabinets ministériels, et à l'aménagement de logements dans les bâtiments situés place des Martyrs, à Bruxelles (FED + FI C), 28.03.91 (01.06.91)
III – D11.228/14
- Accord de coopération concernant l'élaboration d'un programme de recherche "SIDA" (FED + 3C), 29.11.91 (05.02.92)
XI – D11.308/5
- Accord de coopération en matière de formation des classes moyennes et d'accès à la profession (FED + 3C), 11.12.91 (17.01.92)
X – D11.298/1
- Accord de coopération concernant les échanges d'informations relatives aux projets ayant un impact transrégional sur l'environnement (FED + FI C), 22.09.92
VIII – D11.278/7
- Accord de coopération relatif à la coordination de la politique en matière de réglementation du chômage et la politique en matière de formation professionnelle dans un établissement d'enseignement, (FED + C FI) 22.09.92 (28.10.93, 02.12.93)
VIII – D11.278/8
- Accord de coopération portant création d'un Comité consultatif de bioéthique (FED + 3C), 15.01.93 (15.06.95)
XI – D11.308/9
- Protocole conclu entre le Gouvernement fédéral et les autorités visées aux articles 59bis, 59ter et 108ter de la Constitution concernant la politique de santé à mener (FED + 3C), 28.07.93 (28.09.93)
XI – D11.308/2
- Protocole relatif à la politique de santé à l'endroit des personnes âgées (FED + 3C + COCOF), 09.06.97 (30.07.97)
- Accord de coopération relatif à l'aide sociale dispensée aux détenus en vue de leur intégration sociale (FED + FI C), 28.02.94 (18.03.94) ; am. 07.07.98 (10.04.01)
XVIII – D11.378/1
- Accord de coopération relatif à l'exécution de l'article 45ter de la loi spéciale du 16 janvier 1989 relative au financement des Communautés et des Régions et l'article 58 *quater* de la loi du 31 décembre 1983 de réformes institutionnelles pour la Communauté germanophone – Versement du précompte professionnel (FED + 3C), 13.12.94 (17.01.95)
VI – D11.258/10
- Protocole relative à la vaccination contre l'Hépatite B (FED + 3C + COCOF+ COCOM) (22.04.97)
- Protocole sur l'organisation d'une enquête sur la santé (FED + 3C + COCOF+ COCOM) (03.06.97)
- Protocole relatif à la politique de la santé à l'endroit des personnes âgées (FED+ 3C + COCOF+ COCOM) (30.07.97)
- Accord de coopération en matière d'assistance aux victimes (FED + FI C), 07.04.98 (13.07.99)
XVIII – D11.378/4
- Accord de coopération relatif aux Pôles d'attraction interuniversitaires - Phase IV (FED + 3C), 07.07.98 (25.11.98) ; Phase V, 26.10.01 (12.09.02)
IV – D11.238/8

- Accord de coopération entre relatif à la guidance et au traitement d'auteurs d'infractions à caractère sexuel (FED + FI C), 08.10.98 (11.09.99)
XV – D11.348/3
- Protocole de coopération entre le Ministre de la Justice et les membres du Collège réuni de la COCOM chargés de l'aide aux personnes concernant l'aide sociale aux détenus et aux personnes faisant l'objet d'une mesure ou d'une peine à exécuter dans la Communauté (FED + COCOM) 25.03.99 (10.09.99)
XVIII – D11.378/5
- Accord de coopération concernant la guidance et le traitement d'auteurs d'infractions à caractère sexuel (FED + COCOM + COCOF), 13.04.99 (26.07.00, 15.11.00, 23.01.01)
XV – D11.348/4
- Accord de coopération concernant la convention de premier emploi (FED + Fr C), 25.10.00 (18.12.01, 2^e ed.)
VIII – D11.278/19
- Accord de coopération concernant la convention de premier emploi (FED + FI C), 25.10.00 (18.12.01, 2^e ed.) ; 2^{ème} accord, 01.08.02 (19.11.02)
VIII – D11.278/19
- Accord de coopération concernant la construction et l'exploitation d'une e-plate-forme commune (FED + COCOM + COCOF + COCON), 09.03.01 (08.08.01)
III – D11.228/27
- Accord de coopération concernant les conventions de premier emploi jeunes pour les médiateurs interculturels des centres publics d'aide sociale dans le cadre du programme printemps du Gouvernement fédéral (FED + COCOM), 17.04.01 (17.05.01)
XVIII – D11.378/6
- Accord de coopération relatif au centre fermé pour le placement provisoire de mineurs ayant commis un fait qualifié d'infraction (FED + 3C), 30.04.02
XV – D11.348/5
- Accord de coopération concernant la convention de premier emploi (FED + GC) 01.08.02 (19.11.02)
VIII – D11.278/19

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- Accord instituant les Comités subrégionaux de l'emploi et la formation (Fr C + WR), 24.11.89 (17.02.90, 31.03.90)
VIII – D11.278/3
- Protocole relatif à l'implantation des cabinets ministériels de l'Exécutif flamand place des Martyrs à Bruxelles (FI C + RBC), 3.10.90 (20.10.90)
III – D11.228/11
- Accord de coopération relatif à l'exercice conjoint de compétences par la Communauté française et la Région wallonne (Fr C + WR), 17.11.90 (04.05.91), am. 02.04.92 (03.09.92)
(I - D11.08/1)
- Accord de coopération relatif au Fonds budgétaire interdépartemental de promotion de l'emploi (Fr C + WR + RBC), 07.01.91, 25.11.92 (16.05.91, 26.06.93, 04.02.92, 23.06.95)
VIII – D11.278/4
- Accord de coopération instituant un Comité subrégional de l'emploi et de la formation à Saint-Vith (WR + GC), 18.07.91 (28.04.92)
VIII – D11.278/6
- Accord de coopération relatif à la formation permanente pour les classes moyennes et les petites et moyennes entreprises (WR + Fr C + COCOF), 20.02.95 (13.09.95, 29.03.96, 03.04.97)
X – D11.298/2
- Accord de coopération relatif à la prise en charge des frais de placement et d'intégration sociale et professionnelle des personnes handicapées (FI C + WR), 07.04.95
XI – D11.308/14
- Accord de coopération relatif à la prise en charge des frais d'intégration sociale et professionnelle des personnes handicapées (GC + WR), 10.04.95 (06.11.96)
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- Accord de coopération concernant l'application du "werkervaringsplan" dans la région de Bruxelles-Capitale (FI C + RBC), 30.04.96
VIII – D11.278/11
- Accord de coopération portant création du Comité Bruxellois Néerlandophone pour l'Emploi et la Formation (FI C + RBC), 30.04.96
VIII – D11.278/12
- Accord de coopération mettant en oeuvre le rapprochement des administrations compétentes en matière de relations extérieures (Fr C + WR), 27.01.98 (03.06.98 , 17.12.98)
V – D11.248/8
- Accord de coopération relatif à l'implantation d'ordinateurs dans les écoles wallonnes (Fr C + GC + WR), 19.02.98 (11.12.98, 13.07.99)
XIII – D11.328/5
- Accord de coopération entre la Région wallonne et la Communauté française relatif au transport interne (WR – Fr C), 25.05.98 (04.09.99 ; 23.12.99)
III – D11.228/26
- Accord de coopération relatif à la problématique des transports scolaires entre le Gouvernement de la Communauté française et le Gouvernement de la Région Wallonne (Fr C + WR), 25.05.98 (15.07.99)
XIII – D11.328/6
- Accord de coopération relatif à l'organisation d'une filière de formation qualifiante en alternance, conclu à Namur, le 18 juin 1998, entre le Gouvernement de la Communauté française et le Gouvernement wallon (Fr C + WR), 18.06.98 (13.08.99)
XIII – D11.328/7
- Accord de coopération relatif à la coordination et à la gestion des aides octroyées par la Commission européenne dans le domaine des ressources humaines et à la création de l'Agence Fonds social européen (WR + Fr C + COCOF), 02.09.98 (02.06.99, 17.06.99, 06.01.00)
V – D11.248/10
- Accord de coopération entre la Communauté flamande et la Région wallonne en matière d'intégration des personnes handicapées (FI C + WR), 20.10.98 (19.06.99)
XI – D11.308/15
- Accord de coopération global entre la Région wallonne et la Communauté germanophone (WR + GC), 26.11.98 (21.08.99)
(I – D.11.08/3)
- Accord de coopération entre la Communauté française, la Région wallonne et la Communauté germanophone instituant la "Commission Consultative de l'UNESCO" pour la Communauté française, la Région wallonne et la Communauté germanophone de Belgique (WR + Fr C + GC), 09.06.99
V – D11.248/11
- Accord de coopération relatif aux programmes d'immersion linguistique (Fr C + WR), 04.07.00 (08.12.00)
VIII – D11.278/16
- Accord de coopération relatif à la mise à disposition d'équipements pédagogiques en faveur des élèves et des enseignants de l'Enseignement secondaire technique et professionnel (Fr C + WR), 04.07.00 (08.12.00)
VIII – D11.278/15
- Accord de coopération « betreffende de bevordering van de algemene samenwerking » (FI C + FI R + GC), 14.02.01
(I - D11.08/4)
- Accord de coopération portant création du comité francophone de coordination des politiques d'aide aux personnes et de santé (Fr C + WR + COCOF), date non-reprise au Moniteur (10.02.03)
XI – D11.308/17

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- Protocole concernant la gestion des déchets (WR + FI R), 30.10.89 (12.12.89)
XII – D11.318/1
- Protocole concernant la gestion des déchets (RBC + WR), 08.12.89 (20.02.90)
XII – D11.318/2
- Accord de coopération concernant les transports réguliers interrégionaux (FI R + WR), 01.01.91 (02.04.92)
III – D11.228/12
- Accord de coopération concernant le transport régulier, de et vers la Région de Bruxelles-Capitale (3R), 17.06.91 (31.10.91)
III – D11.228/17
- Accord de coopération concernant les routes dépassant les limites d'une Région (3R), 17.06.91 (09.01.92)
III – D11.228/19
- Accord de coopération en matière de gestion et d'exploitation du canal de Bruxelles-Rupel (FI R + RBC), 17.12.91 (07.02.92)
III – D11.228/20
- Accord de coopération relatif à l'affectation des écotaxes et à la coordination des politiques régionales en cette matière (3R), 30.04.93 (05.10.93, 25.01.95)
XII – D11.318/4
- Accord de coopération en matière de surveillance des émissions atmosphériques et de structuration des données (3R), 18.05.94 (24.06.94) ; am. 21.12.95 (19.09.96)
XII – D11.318/6
- Accord de coopération "betreffende de uitwisseling van informatie over projecten met gewestgrensoverschrijdende milieueffecten" (3R), 04.07.94 (11.08.94)
XII – D11.318/7
- Accord de coopération en matière de voies hydrauliques (3R), 06.04.95
XII – D11.318/12
- Accord de coopération visant à garantir la libre circulation des personnes handicapées (COCOF + WR), 19.04.95, 14.06.96
XI – D11.308/12
- Accord de coopération sur la prévention et la gestion des déchets d'emballages (3R), 30.05.96 (05.03.97)
XII – D11.318/11
- Accord de coopération relatif à la nappe du calcaire carbonifère de la Région du Tournaisis (FI R + WR), 02.06.97 (17.12.97)
XII – D11.318/14
- Accord de coopération relatif à l'introduction d'une réduction de la taxe de mise en circulation (TMC) sur base de la norme d'émission du moteur (comme visé dans la Directive 98/69/CE du 13 octobre 1998) ou de la nature du combustible de propulsion, compte tenu de la neutralité fiscale et en vue de prévenir la concurrence entre Régions au niveau de l'immatriculation des véhicules (3R), 25.04.02 (13.06.02, 12.07.02, 23.07.02)
VI – D11.258/16
- Accord de coopération portant sur l'introduction de l'euro dans l'accord de coopération du 30 mai 1996 concernant la prévention et la gestion des déchets d'emballages (3R), 23.01.03
VI – D11.258/17

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- Accord de coopération portant création, composition et règlement de la Commission intercommunautaire de contrôle des films (3C), 21.12.89, 27.12.90 (20.03.90, 20.04.91) ;
03.10.01 (07.12.01)
XV – D11.348/1
- Accord de coopération concernant la pratique sportive dans le respect des impératifs de santé (FI C + Fr C + GC), 09.11.90, 11.12.91 (07.02.91, 25.04.91, 31.03.92)
XI – D11.308/6

- Accord de coopération concernant la prévention des problèmes d'alcool et de drogues (FI C + Fr C + GC), 18.04.91 (24.08.91)
XI – D11.308/7
- Accord de coopération relatif à la gestion administrative de l'enseignement en Communauté germanophone (Fr C + GC), 30.10.91 (13.02.92)
XIII – D11.328/2
- "Samenwerkingsprotocol voor het verlenen van bijstand bij het beheer van de eigen thesaurie" (FI C + GC), 01.07.92
VI – D11.258/8
- Convention relative aux versements de la redevance radio-télévision perçue par l'Etat fédéral (3C), 01.06.94
VI – D11.258/5
- Accord formel de coopération qui règle les rapports officiels entre les institutions des deux parties (Fr C + GC), 12.04.95 (08.09.1999), et Erratum, 12.04.95 (03.02.99)
(I – D.11.08/2)
- Accord de coopération concernant la perception de la redevance radio et télévision (3C), 25.07.97 (21.02.98, 20.06.98)
VI – D11.258/11
- Accord de coopération concernant la perception de la redevance radio et télévision sur le territoire de la Région bilingue de Bruxelles-Capitale (FI C + Fr C), 25.07.97 (21.02.98, 20.06.98)
VI – D11.258/12
- Accord de coopération relatif aux modalités d'exercice des relations internationales de la Commission communautaire française (Fr C + COCOF), 30.04.98 (21.08.98, 02.12.98)
V – D11.248/9
- Accord de coopération en matière de pratique du sport dans le respect des impératifs de santé (FI C + Fr C + GC + COCOM), 19.06.01
XI – D11.308/6
- Accord sectoriel en matière d'aide à la jeunesse (Fr C + GC), 27.04.01 (21.09.01)

APPENDIX C

CANADIAN INTERGOVERNMENTAL AGREEMENTS

Parties:

FED = Federal authorities
 AB = Alberta
 BC = British Columbia
 MB = Manitoba
 NB = New Brunswick
 NF = Newfoundland
 NS = Nova Scotia

NT = North West Territories
 NV = Nunavut Territory
 ON = Ontario
 PE = Prince Edward Island
 QC = Québec
 SK = Saskatchewan
 YT = Yukon Territory

Codes:

Unless otherwise noted, the quotation in brackets refers to code in the Federal Registry.¹

Codes which start with "SAIC" are from the Québec Registry.²

When there is no code, the text was obtained through other sources (interviews with Department officials etc.).

Dates:

Unless otherwise noted, date provided corresponds to the date of signature or of coming into force. In some cases, no precise date could be found. A "?" indicates that document is not fully dated.

Presentation:

Unless otherwise indicated, the IGAs listed by provinces are bilateral ones with the Federal government.

Within each category, they are listed in chronological order.

MULTILATERAL IGAs TO WHICH THE FEDERAL GOVERNMENT IS A PARTY

- Agreement in Respect of the Revision and Consolidation of the Comprehensive Marketing Program for the Purpose of Regulating the Marketing of Eggs, 29.07.1976 (CA0122)
- Patriation Agreement, 05.11.1981 (FED+ 9 provinces ex QC) (CA00188)
- Interagency Forest Fire Center Operating Agreement, 14.09.1983 (CA00255)
- Agreement on Natural Gas Markets and Prices, 01.11.1985 (CAN+AB+CB+SK) (CA00323)
- Energy Pricing and Taxation Understanding, 01.11.1985 (FED+AB+SK+ BC) (CA00311)
- Agreement Establishing the Net Income Stabilisation, 07.02.1992 (CA00612)
- International Forestry Communication Program -Specified Purpose Account Agreement 1993-1996, 01.09.1993 (CA00892)
- Protocol for Agreements for Minority-Language Education and Second-Language Instruction, 30.09.1993 (CA00783)
- Memorandum of Understanding for Environment Emergencies, 21.12.1993 (CA00595)
- Framework Agreement for Environmental Cooperation in Atlantic Canada, 31.05.1994 (FED+NB+NS+PE+NF) (CA1023)
- Internal Trade Agreement, 01.07.1994 (CA01093; SAIC 1994-029), am. 1998 (SAIC 1998-045)

¹ Re selection of agreements and descriptions of the Federal and Québec registries: General Introduction.

² SAIC = Secrétariat aux affaires intergouvernementales canadiennes (Government of Québec).

- Agreement Regarding the North-American Agreement on Labour Cooperation, 31.05.1995, impl. 01.01.1998 (CA01721)
- Transfer of Parole Jurisdiction Agreement, 01.02.1996, am. 14.04.1997 (FED+ON BC+QC) (CA01315)
- Memorandum of Understanding Regarding the Assiniboine River Basin Study, 22.10.1996 (FED+MB+SK) (CA01510)
- Protocol for Agreements Between the Government of Canada and the Provincial/Territorial Governments for Minority-Language Education and Second-Language Instruction, 30.09.1996 (CA00783)
- Atlantic Canada Agreement on Tourism, 01.04.1997 (CA 01634)
- Transfer of Parole Jurisdiction Agreement, 01.02.1996, am. 14.04.1997 (CAN+BC+ON+QC) (CA01315)
- Mackenzie River Basin Transboundary Waters Master Agreement, 24.07.1997 (FED+AB CB+SK+TN+YK) (CA01530)
- Agreement on All Milk Pooling, 01.08.1997 (PE-MB-NB-NE-ON-QC) (CA01708)
- Canada-wide Accord on Environmental Harmonization, 29.01.1998 (CA01739)
- Framework to Improve the Social Union for Canadians 04.02.1999 (CA17087)
- Protocol for Agreements for Minority-Language Education and Second-Language Instruction (1998-1999 to 2002-2003), 23.02.2000 (see CA00783 and CA01968 for previous agreements)
- Health Care Renewal, 05.02.2003 (no code)
- Agreement on Proposed Changes to the Canada Pension Plan, 14.02.2003 (FED+AB+PE+MB+NB+NS+ON+QC+NF) (CA1575)
- Interprovincial Computerized Examination Management System Agreement, 01.07.1995 (CA 012221)

INTERPROVINCIAL AGREEMENTS

- Entente de réciprocité sur le droit des compagnies de faire des affaires dans l'autre province, 01.03.1930 (ON-QC) (SAIC 1930-001)
- Accord concernant le paiement des coûts des personnes hospitalisées dans des sanatoriums, 29.10.1945 (SAIC 1945-001)
- Accord de coopération et d'échanges en matière d'éducation et de culture, 18.12.1969 (QC-NB) (no code)
- Accord de coopération et d'échanges en matière d'éducation, de culture et de communications, 06.19.1969, Protocole Additionnel 20.06.1989 (no code)
- Agreement creating the Council of Maritime Premiers, 25.05.1971 (NB-NS-PE) (no code)
- Entente de coopération en matière d'environnement, 13.06.1988 (ON-QC) (no code)
- Accord de facturation réciproque en matière d'assurance-hospitalisation, 02.11.1988 (ON-QC) (SAIC 1989-001)
- Accord de coopération et d'échanges en matière d'éducation et de culture, 19.08.1989 (QC-PE) (no code)
- Protocole d'entente concernant un programme d'échanges et de coopération dans le domaine de l'enseignement supérieur, 31.05.1991 (QC-NB) (no code)
- Agreement on the Opening of Public Procurement, 11.11.1993 (QC-NB) (no code)
- Accord de libéralisation des marchés publics, 03.11.1993 (QC-NB) (no code)
- Agreement on the Opening of Public Procurement, 05.03.1994 (QC-ON) (no code)
- Agreement on the Mutual Recognition of Construction Workers Qualifications, Skills and Work Experience, 03.05.1994, am. Dec. 1996 and 15.11.2000 (QC-ON) (SAIC 1997-007 and SAIC 2000-043)
- Atlantic Procurement Agreement on the Reduction of Interprovincial Trade Barriers Relating to Public Procurement, 17.04.1996 (NB-NS-NF-PE) (no code)
- Entente relative à l'échange de renseignements concernant l'imposition des sociétés et l'impôt-santé des employeurs, 23.09.1997 and 23.03.1998 (QC-ON) (SAIC 1998-008)
- Agreement on Labour Mobility in the Construction Industry, 24.04.1998 (QC-NF) (no code)
- Entente entre le gouvernement du Québec et le gouvernement de l'Ontario relativement à l'exploitation, à l'entretien et à la réfection d'un pont franchissant la rivière Outaouais et reliant Hawkesbury et Grenville, 04.08.1999 (ON-QC) (SAIC 1999-069)

- Entente de réciprocité en matière d'assurance-hospitalisation, 04.11.1999 (SAIC 1999 – 031)
- Memorandum of Understanding of Atlantic Canada Cooperation (15.05.2000) (NB-NS-NF_PE) (no code)
- Vehicle Weight and Dimensions Agreement, impl. 01.01.2001 (ON-QC) (no code)

OTTAWA-ALBERTA

- Memorandum of Agreement Respecting the Native Courtworker Program, 01.04.1987 (AB00395)
- Firearms Financial Agreement, retroactive to 01.04.1993 (AB00784)
- Safety Code Funding Agreement, 01.04.1995 (AB 01148)
- Memorandum of Understanding between the Canadian Trade Office in Taipei and the Government of Alberta, 01.04.1996 (AB 01145)
- The Western Grain Transportation Adjustment Fund, the Canada Agri-Infrastructure Program 1996-1997, 14.08.1996 (AB 01466)
- Canada-Alberta Agreement on Labour Market Development, 06.12.1996 (AB01525)
- Agreement Respecting Legal Aid in Criminal Law Matters and in Matters Relating to the Young Offenders Act, 01.04.1996 (AB01348)
- Agreement on Health Services In French, entry into force 01.04.1997 (AB01619)
- Hog Industry Development Companion Agreement, 16.04.1997 (AB01667)

OTTAWA- BRITISH COLUMBIA

- Agreement Regarding Delivery of Health Care and Treatment Services to Veterans, 08.06.1990 (BC00545)
- Memorandum of Agreement Respecting Federal Contributions to Juvenile Justice Services under the Young Offenders Act, impl. 01.04.1996 (BC01351)
- British Columbia Treaty Commission Operating Costs Agreement, ? .04.1997, retroactive to 01.09.1996 (BC01469)
- Protocol for Processing Transfers pursuant to Section 35 of the *Indian Act* and s. 18 of the *Highways Act*, 01.11.1996 (BC 01512)
- Agreement between the Government of Canada and the Government of British Columbia for Minority-Language Education and Second-Language Instruction 1993-94 to 1997-98, 27.03.1997 (BC00789)
- Tuberculosis Memorandum of Agreement, 01.04.1997 (BC 01622)
- The Tuberculosis Loan Agreement, 01.04.1997 (BC 01623)
- Canada-British Columbia Agreement for Environmental Assessment Cooperation, 16.04.1997 (BC 01670)
- Subsidiary Framework Agreement for Joint Review Panels under the Canada-B.C. Agreement for Environmental Assessment Cooperation, 16.04.1997 (BC 01672)
- Subsidiary Agreement on Notification Procedures under the Canada-BC Agreement for Environmental Assessment Cooperation, 15.05.1997 (BC01694)
- Subsidiary Framework Agreement for Joint Review Panels under the Canada-British Columbia Agreement for Environmental Assessment Cooperation, 15.05.1997 (BC 01693)
- Canada-British Columbia Agreement on Labour Market Development, 25.04.1997 (BC 01681)
- Canada-British Columbia Agreement on Asia-Pacific Initiatives, 31.12.1997 (BC 01720)
- Canada-BC Provisional Arrangements for Minority-Language Education and Second-Language Instruction for 1999-2000, 15.07.1999 (no code)
- Framework Agreement to Negotiate a Treaty between the Carrier Sekani Tribal Council, Canada and British Columbia, 25.04.1997 (BC 01682)
- Agreement Regarding the Funding and Administration of Child Welfare Services to the Nisga'a Tribe, 05.05.1997 (BC01687)
- Agreement Regarding Delivery of Health Care and Treatment Services to Veterans, 08.06.1990 (BC 00545)

OTTAWA- MANITOBA

- Agreement Concerning Deer Lodge Hospital, impl. 01.05.1983 (MB00210)
- Immigration Agreement, 22.10.1996 (MB01509)
- Agreement to Realign Responsibilities for Immigrant Settlement Services, 28.06.1998 (MB1766)
- Immigration Agreement, Addendum B (Provincial Nominees), 22.10.1996 (MB1785)
- Agreement on Labour Market Development, 17.04.1997 (MB01664)
- Agreement on Red River Valley Flood Disaster Assistance, 01.05.1997 (MB1686)
- General Agreement on the Promotion of Official Languages, 16.02.2001 (no code)
- Island Lake First Nations Family Services Agreement, 21.04.1997 (MB 01675)
- Agreement Respecting Legal Aid in Criminal Law Matters and in Matters Relating To The Young Offenders Act, 01.04.1996 (MB01358)

OTTAWA- NEW BRUNSWICK

- Highway Improvement Agreement, 29.06.1987 (NB00418)
- Entente sur les langues officielles dans l'enseignement, 23.10.1988 (no code)
- Entente auxiliaire relative au Centre international de *Common Law* en français de l'Université de Moncton, 04.11.1989 and 14.09.1995 (no code)
- Transfer of Title to Lands, Wharves and Related Facilities, 04.03.1997 (NB 01596)
- Entente spéciale relative à la construction de l'École de droit de l'Université de Moncton, 21.10.1993 (no code)
- Entente auxiliaire sur la construction de l'École de génie électrique de l'Université de Moncton, 20.07.1995 (no code)
- Atlantic Freight Transition Program 1995-96 / 1997-98, 18.09.1995 (NB 01158)
- Agreement on Labour Market Development, 13.12.1996 (NB1527)
- Agreement to Transfer Lands, Wharves and Related Facilities at the Ports at North Head, on Grand Manan Island and Wallace Cove in Blacks Harbour, 19.03.1997 (NB1596)
- Agreement for Minority-Language and Second-Language Instruction, 27.03.1997 (no code)
- General Agreement on the Promotion of Official Languages, 18.10.1999 (no code)

OTTAWA- NEWFOUNDLAND

- The Atlantic Accord, 11.02.1985 (NF and Labrador and Canada) (NF 00308)
- Trans Canada Highway Agreement, 21.06.1988 (NF00450)
- Regional Trunk Roads Agreement, 07.06.1992 (NF00570)
- Agreement Respecting Administration of the Transportation of Dangerous Goods Act, 23.11.1992 (NF1716)
- Strategic Highway Improvement Programme, 01.04.1994 (NF00985)
- Atlantic Freight Transition Program 1995-96 / 2000-01, 10.12.1995 (NF01164)
- Agreement Relating to the Communication of Information Benefits Payable Under The Canada Pension Plan and the Assignment of Canada Pension Plan Benefits to the Province of Newfoundland, 01.11.1996 (NF1514)
- Labour Market Development, 24.03.1997 (NF 01602)
- Agreement concerning the operation of marine freight and passenger services, 28.03.1997 (NF1611)
- Special Agreement for the Implementation of Francophone School Governance, 01.04.1997 (NF 01636)
- General Agreement on the Promotion of Official Languages, 16.03.1998, am. 24.09.1999 (no code)

OTTAWA- NORTH WEST TERRITORIES

- Agreement on a Business Service Center, 17.06.1996 (NT01436)
- Canada-NWT Agreement on Labour Market Development, 27.02.1998 (NT 01755)
- Cooperation Agreement concerning French and Aboriginal Languages, 05.01.2000 (no code)

OTTAWA- NOVA SCOTIA

- Camp Hill Transfer Agreement, 08.05.1978, am. 21.03.1983 and 31.01.1992 (NS00141)
- Canada-Nova Scotia Offshore Petroleum Resources Accord, 26.08.1986 (NS 00368)
- Atlantic Freight Transition Program, impl. 01.04.1995 (NS001168)
- Agreement on a Framework for Strategic Partnerships (Labour market), 24.04.1997 (NS1680)
- General Agreement on the Promotion of Official Languages, 21.03.2000 (no code)

OTTAWA- Nunavut

- Cooperation Agreement for French and Inuit Languages, 16.11.1999 (no code)

OTTAWA- ONTARIO

- Intergovernmental Agreement concerning the Ontario Aerospace Corp., 09.03.1992 (ON 00639)
- Framework Agreement between Canada, Ontario Bombardier and de Havilland, 09.03.1992 (ON 00640)
- Access to Long-Term Health Care Facilities, 07.03.1994 (PE00971)
- Transfer of Property of Hospital at Sioux Look-out, 11.04.1997 (ON 01662)
- General Agreement on the Promotion of Official Languages, 02.12.1999 (no code)
- Contraventions Act Agreement (Draft), date ? 1996 (unsigned) (no code)

OTTAWA- PRINCE EDWARD ISLAND

- Canada - Prince Edward Island Atlantic Freight Transition Programme 1996-97/2000-01, 25.01.1996 (PE 01392)
- Agreement Concerning the Collection and Sharing of Information on the Importance of Nature to Canadians, 17.03.1997 (PE1600)
- Contraventions Act Agreement, 27.03.1997 (no code)
- Canada - Prince Edward Island Agreement on Labour Market Development, 26.04.1997 (PE01683)
- General Agreement on the Promotion of Official Languages, 31.03.2000 (no code)

OTTAWA- QUEBEC

- Memorandum of Agreement Respecting Old Age Assistance, 29.01.1952 (SAIC 1952-001)
- Entente sur la censure des films, 12.11.1954 (SAIC 1954-001)
- Memorandum of Agreement Relative to Invalidity Allowances, 28.03.1955 (SAIC 1956-001)
- Mémorandum de l'Accord Canada-Québec concernant l'assurance-chômage, 01.07.1959 (SAIC 1959-001)
- Agreement relating to the *Canada Assistance Plan*, 21.08.1967 (QC00044)
- Entente d'échange de services au sujet de l'incarcération de personnes condamnées, 15.02.1974, am. 21.04.1998 (SAIC 1998-019)
- Arrêté ministériel concernant le transfert en faveur du gouvernement du Canada de l'usage d'un terrain situé dans le canton de Falardeau, 09.06.1977 (SAIC 1997-100)
- Agreement concerning the Reine-Marie Hospital, impl. 20.04.1978 (QC00148)

- Entente de transfert entre la Commission administrative des régimes de retraite et d'assurances, 12.12.1984 (SAIC 1984-023)
- Administration and Assignment Agreement, 01.08.1986 (QC 00366)
- Agreement regarding the issuance of drivers' licences for Canadians present in the Federal Republic of Germany, 01.10.1988 (QC00462)
- Accord administratif concernant le projet petites et moyennes entreprises en Thaïlande, 18.01.1990, am. 27.04.1995 (QC 00511)
- Memorandum of Agreement Respecting the Native Courtworker Program, signed 1990, retroactive to 01.04.1982 (QC00201)
- Accord Relating to Immigration and Temporary Admission of Aliens, 05.02.1991 (QC00563)
- Auxiliary Agreement on Construction Projects under the Terms of the Canada-Québec Agreement on Minority-Language Education and Second-Language Instruction, 27.03.1991, am. 27.03.1996 (no code)
- Agreement Concerning the Perception of the Goods and Services Tax, 26.04.1991 (SAIC 1991-15), am. 1997 (SAIC 1997-038)
- Strategic Highway Improvement Plan, 16.10.93 (QC01753)
- Entente de remboursement de frais par le Canada au Québec pour la réfection des infrastructures d'aqueduc et d'assainissement des eaux de Shefferville, 31.03.1994, am. last time 30.11.1999 (SAIC 1999 -037)
- Modalités d'échanges des ressources humaines dans le cadre de St-Laurent Vision 2000, 01.04.1994 (QC 00995)
- Canada-Quebec Agreement on the Exchange of Personal Information Arising from the Transfer of Reception and Integration Services as Agreed in the Canada-Quebec Accord Relating to Immigration and Temporary Admission of Aliens, 13.07.1995 (QC01239)
- Harmonization and Co-ordination Agreement Respecting the Conservation, Protection, Clean-Up and Restoration of the St. Lawrence River and Priority Tributaries, entitled St. Lawrence Vision 2000, 18.04.1994 (QC 01002)
- Agreement Respecting the Application in Quebec of Federal Pulp and Paper Mill Regulations, 06.05.1994 (QC01007)
- Entente relative aux informations concernant les sentences, 01.04.1995 (QC1182)
- Agreement on the Exchange of Information (immigration), 13.07.1995 (QC01239)
- Amendment to the Auxiliary Agreement on Construction Projects under the Terms of the Canada-Québec Agreement on Minority-Language Education and Second-Language Instruction, 27.03.1996 (no code)
- Agreement on terminological cooperation between Québec's Office of the French Language and the Translation Bureau of the Government of Canada, 15.11.1996 (QC1521)
- Agreement Respecting Legal Aid in Criminal Law Matters and in Matters Relating to the Young Offenders Act, 01.04.1996 (QC01398)
- Minority-Language Education and Second-Language Instruction Agreement, 27.03.1997 (retroactive: coming into force 01.03.1993) (QC00824)
- Labour market agreement in principle, 21.04.1997 (QC1676) (with two letters concerning language rights date 25/28.03.1997)
- Protocole d'entente entre Listuguj Mi'gmaq First Nation Community Social Services Directorate et Listuguj Mi'gmaq First Nation, Canada et Québec (social services) 21.05.1997 (SAIC 1997-021)
- Entente sur le système d'information sur la photographie aérienne, 09.11.1997 (SAIC 1997-029)
- Entente de mise en œuvre relative au marché du travail, 01.12.1997 (no code)
- Entente administrative concernant le programme canadien de bourses de la francophonie, 15.01.1998 (SAIC 1997-032)
- Agreement on Cooperation Regarding the St-Lawrence, 01.04.1998 (QC 01756)
- Cession de bail entre le Canada et la Compagnie de chemins de fer nationaux relativement à des terrains connexes à des chemins de fer situés au Québec [QC being tenant, this is considered an IGA by SAIC], 07.04.1998 (SAIC 1998-049)
- Protocole d'entente concernant l'organisation et les modalités d'application administratives et financières relativement au huitième sommet des Chefs d'État et de gouvernement des pays ayant le français en partage, 19.05.1998 (SAIC 1998-013)
- Entente concernant le recours aux services des inspecteurs de la sécurité ferroviaire du Ministère des transports du Canada, 4/27.05.1998 (SAIC 1998-015)
- Entente affectant un représentant du Québec à la mission diplomatique de Beijing, 06.06.1998 (SAIC 1998-023)

- Entente concernant un représentant québécois à la mission de Beijing, 01.08.1998 (QC01780)
- Accord concernant la collecte et le partage de renseignements de l'enquête sur l'importance de la nature pour les Canadiens entre le Ministère de l'environnement et de la faune du Québec et Statistique Canada, 13.08.1998 (SAIC 1998-029)
- Entente spécifique relative au fonds d'aide aux sinistrés créée en vertu de la partie II de la Loi sur l'assurance-emploi, 15/24.09.1998, retroactive to 01.04.1998 (SAIC 1998-050)
- Lettre d'entente concernant la création d'un secrétariat commun sur l'an 2000 dans le secteur de la santé, 28.09.1998 (SAIC 1998-033)
- Entente transitoire sur la réadaptation professionnelle des personnes handicapées pour la période 1996-1998, 18.12.1998 (SAIC 1998-044)
- Entente relative au financement de la mise en œuvre des mesures québécoises de fixation des pensions alimentaires pour enfants et de médiation familiale, 30.03.1999 (SAIC 1999-004)
- Entente-cadre pour la négociation concernant l'autonomie gouvernementale de la nation Micmac de Gespec (FED + QC + Nation Micmac de Gespec), 18.05.1999 (SAIC 1999-011)
- Entente concernant la mise en œuvre d'un programme de prestations de retraite anticipée pour les travailleurs du secteur des pêches, 19.05.1999 (SAIC 1999-017)
- Protocole d'entente relatif à l'alphabétisation, 21.05.1999 (SAIC 1999-005)
- Mesures provisoires relatives à l'enseignement dans la langue de la minorité et à l'enseignement de la langue seconde pour 1999-2000, 01.04.1999 (SAIC 1999-041)
- Entente administrative relative aux bourses du millénaire, 28.10.1999 (SAIC 2000-001)
- Accord politique pour l'examen d'une forme de gouvernement au Nunavik par l'institution d'une Commission du Nunavik (FED + QC + Nunavik), 05.11.1999 (SAIC 1999-033)
- Entente relative au financement de la mise en œuvre des mesures québécoises de perception automatique des pensions alimentaires, 30.03.2000 (SAIC 2000-005)
- Agreement to Prorogate an Agreement Pursuant to which Communication Québec Provides Information on Federal Services, 30.03.2000 (SAIC 2000)
- Accord financier relatif à l'administration de la Loi sur les armes à feu, 11.12.2000 (retroactive to 01.06.1998) (SAIC 2000-045)
- Accord relatif à la loi sur les contraventions, 31.03.2001 (SAIC 2000-036)
- Agreement Regarding Hydrometric and Sediment Networks in Quebec, 23.05.1997 (QC01698)

OTTAWA-SASKATCHEWAN

- Global Agreement on Social Housing, 07.07.1986 (SK 00344)
- Loan Insurance Agreement, 07.07.1986 (SK 00345)
- Rental-Residential Rehabilitation Assistance Program, 07.07.1986 (SK00350)
- Operating Agreement to Carry into Effect the Principles of the 1986 Global Agreement on Social Housing, 07.07.1986 (SK 00354)
- Assignment Agreement concerning the Wascana Rehabilitation Centre, 23.10.1989 (SK00625)
- Agreement Relating to the Integration of Payment of Old Age Security and Saskatchewan Income Plan benefits, 17.07.1995 (SK1657)
- Social Housing Agreement, 01.01.1997 (SK 01804)
- Agreement on Labour Market Development, 06.02.1998 (SK 01757)
- General Agreement on the Promotion of Official Languages, 31.03.2000 (no code)
- Trust Agreement between the Canada Mortgage and Housing Corporation and the Saskatchewan Housing Corporation, 07.07.1986 (SK00355)

OTTAWA- YUKON TERRITORY

- Capital Contribution Agreement for the Whitehorse General Hospital, 01.04.1993, am. 30.07.1993 (YT 00833)
- Universal Health Program Transfer Agreement, 01.04.1997 (YT 01661)
- Funding Agreement on the Development, Enhancement and Implementation of French Languages Rights and Services 1999-2004, 29.12.1999 (no code)

